Supreme Court, U.S.
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No. 03-1426

In the
Supreme Court of the United States

NORTHERN VOYAGER LIMITED PARTNERSHIP;
ONEBEACON AMERICA INSURANCE COMPANY f/k/a
COMMERCIAL UNION INSURANCE COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

During efforts to fight flooding aboard the *Northern Voyager*, a 144-ft. fishing trawler, the Coast Guard removed the three senior officers by legal compulsion and threat of force, over their express objection. The ship sank as a result. The Coast Guard was performing no law enforcement or national security function, but instead only its search-and-rescue role. Relying on the discretionary function exception to government tort liability, the Court of Appeals affirmed a grant of summary judgment in favor of the United States—holding that 14 U.S.C. §88 afforded the Coast Guard this coercive power by virtue of text providing that "the Coast Guard may . . . perform any and all acts necessary to rescue and aid persons" in distress.

The case thus presents the following question:

> Whether in light of federalism principles and the Fourth and Fifth Amendments, a competent adult — in this case, an experienced shipmaster — enjoys the liberty to make his *own* decisions about risks to his personal safety, free of a *de facto* arrest by federal officials, effected solely to impose upon him a "rescue," against his express will, from a risk he has freely undertaken to face;
>
> > And if so, whether Congress, by its use of the phrase "may . . . perform any and all acts necessary," intended to give the Coast Guard the power to force such a rescue upon the unwilling, and to grant judicially-unreviewable discretion to its junior field personnel to seize the person of a citizen in the process.

PARTIES TO THE PROCEEDINGS BEFORE THE COURT OF APPEALS

1. Northern Voyager Limited Partnership. Owner of the vessel; appellant in the court of appeals in No. 02-1620; plaintiff in the district court.

2. OneBeacon America Insurance Company. Subrogated insurer of the vessel; appellant in the court of appeals in No. 02-1620; plaintiff in the district court.

3. Thames Shipyard & Repair Company. Repair yard as to the vessel; appellant in the court of appeals in No. 02-1619; defendant and a cross-claimant as against the United States in the district court.

4. United States of America. Appellee in the court of appeals in both Nos. 02-1619 and 02-1620. Defendant and defendant-in-cross-claim in the district court.

CORPORATE DISCLOSURE STATEMENT

Petitioner OneBeacon America Insurance Company is a Massachusetts corporation formerly known by the name of Commercial Union Insurance Company. It is not a publicly traded corporation. Its stock is wholly owned by its corporate parent OneBeacon Insurance Company, likewise not publicly traded, whose stock is in turn wholly owned by OneBeacon Insurance Group, LLC, likewise not publicly traded, whose stock is in turn wholly owned by Fund American Companies, Inc., likewise not publicly traded, whose stock is in turn wholly owned by Fund American Enterprises Holdings, Inc., likewise not publicly traded, whose stock is in turn wholly owned by WM Bridgetown (Barbados) Ltd., likewise not publicly traded, whose stock is in turn wholly owned by

White Mountains (Luxembourg) S.a.r.l., likewise not publicly traded, whose stock is in turn wholly owned by WM Asset Management (Barbados) Ltd., likewise not publicly traded, whose stock is in turn wholly owned by White Mountains Holdings (Barbados) SRL, likewise not publicly traded, whose stock is in turn wholly owned by White Mountains Insurance Group, Ltd. The last of these is publicly traded.

Petitioner Northern Voyager Limited Partnership is not a corporation.

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Northern Voyager Limited Partnership and OneBeacon America Insurance Company pray that the Supreme Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 4a-65a) is reported as *Thames Shipyard and Repair Company v. United States*, at 350 F.3d 247, as is the order denying the motion for rehearing *en banc*, and the opinion dissenting from that denial (Pet. App. 1a-3a). The ruling of the United States District Court for the District of Massachusetts (Pet. App. 66a-75a) is reported as *Northern Voyager Ltd. Partnership v. Thames Shipyard & Repair Co.* at 214 F.Supp.2d 47.

JURISDICTION

The judgment of the Court of Appeals was entered on November 26, 2003. Its order denying petitioners' timely motion for rehearing and suggestion for rehearing *en banc* was entered on January 26, 2003. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 14 United States Code, Section 88
Saving life and property

(a) In order to render aid to distressed persons, vessels, and aircraft on and under the high seas and on and under the waters over which the United States has jurisdiction and in order to render aid to persons and property imperiled by flood, the Coast Guard may:

(1) perform any and all acts necessary to rescue and aid persons and protect and save property; * * *

Title 28 United States Code, Section 2680
Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency

or an employee of the Government, whether or not the discretion involved be abused. * * *

Title 46 United States Code, Section 742
Libel In Personam

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. * * *

Title 46 Appendix., Section 781
Libel in admiralty against or impleader of United States

A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: Provided, That the cause of action arose after the 6th day of April, 1920.

STATEMENT

Jurisdiction in the district court was in admiralty, founded upon 28 U.S.C. §1333.

The *Northern Voyager* began to take on water about 3 miles off Gloucester, Massachusetts, through a shaft tube left open when her rudder suddenly dropped right out of the hull. This vessel was a freezer-trawler, 144 feet in length, and of U.S. flag. Her master, who had been with the vessel for

many years, mobilized the crew, began to fight the flooding, and called the local Coast Guard. There were thirteen men on board. This all happened in broad daylight on a Sunday morning, November 2, 1997. Pet. App. 5a-6a.

The Coast Guard responded and tried to help, at least for a while. With the concurrence of all concerned, most of the crew transferred to smaller Coast Guard boats at hand. Two Coast Guard enlisted men came aboard and brought additional pumps, which operated fitfully. The three senior officers, who knew the ship best, remained with her to fight the flooding. Pet. App. 6a. They were the master (or captain) David Haggerty, the chief engineer Gary Tibbo, and the chief mate Peter Flaherty.

After a while the Coast Guard people in charge began to fear that the effort was too dangerous. Pet. App. 7a. The three senior officers of the *Northern Voyager* knew it was not too dangerous for *them*, and planned to keep working to save the ship. But the Coast Guard overruled them, and that is at the heart of this case.

Instead of simply withdrawing its *own* people to other vessels, the Coast Guard affirmatively ordered Haggerty, Tibbo and Flaherty to leave the *Northern Voyager*, over their express objections. The Coast Guard enlisted man on board told Captain Haggerty he would be "subdued" if he did not abandon his own ship. Pet. App. 7a. Each man on board had exercised his own free choice to remain on board, and each man who wished to leave the *Northern Voyager* had already done so. Pet. App. 58a. No man's choice was putting anyone else at risk.

There was no suggestion of any national security issue, or any criminal conduct, or any probable cause to confine these

men. Pet. App. 57a-58a. They were simply doing their jobs, fighting to save their ship — as if they had been a thousand miles from the nearest shore or help. The forced evacuation of the ship's officers caused the ship to sink, with damages to the owners of over ten million dollars. Through their own efforts alone — or working with a near-to-hand commercial salvor, racing to the scene with dive gear and pumps — these three officers could have saved the *Northern Voyager* after the Coast Guard had withdrawn, if the Coast Guard had simply left them alone. Pet. App. 8a, 10a-11a.

The petitioners (owners and subrogated insurers) sued the United States for the loss of the *Northern Voyager*. In deposition, Coast Guard witnesses confirmed the testimony of the ship's officers that these men were removed under compulsion.

The government moved for summary judgment, claiming authority for these acts in 14 U.S.C. §88, which provides that, "[i]n order to render aid to distressed persons, vessels, and aircraft . . . the Coast Guard may . . . perform any and all acts necessary to rescue and aid persons and protect and save property . . . ." It argued that this language was a grant of discretion to the Coast Guard to do anything — *without limit* — in the course of responding to distress at sea. This, it argued, made the government immune from suit because of the discretionary function exception of the Federal Tort Claims Act, as implied into the Suits in Admiralty Act and the Public Vessels Act. The District Court did not make any reference whatsoever to 14 U.S.C. §88, but granted summary judgment to the government, relying on the discretionary function exception mentioned above. Pet. App. 13a, 70a-75a.

The Court of Appeals affirmed the District Court as to the coercive removal of Haggerty, Tibbo, and Flaherty, over

their objections. It held that Congress had made the acts in question discretionary when it enacted the above language of 14 U.S.C §88:

> Under the circumstances, we think it reasonable to assume that Congress, in granting the Coast Guard the broad authority to undertake "any and all acts necessary to rescue and aid persons and protect and save property," intended to confer powers analogous to those commonly possessed by state public safety officials, namely, the power to rescue a person even against his will in life-threatening circumstances.

Pet. App. 25a. The majority opinion acknowledged that there was no precedent or legislative history supporting this ruling. Pet. App. 21a. It looked to state law for an analogy, principally to state statutes giving state fire marshals, police, or civil defense officers the power to evacuate people in an emergency. Pet. App. 22a-23a.

Former Chief Judge Juan Torruella dissented, objecting among other things to the reliance on the state statutes and noting that

> the state statutes cited as authority for forcible removals in land-based emergencies contain specific statutory language or have legislative histories granting such authority. These state statutes and authorities are particularly inapposite to the quintessential maritime scenario presented by this appeal, one which should be properly guided solely by the uniquely federal admiralty laws, practices and traditions.

Pet. App. 43a-44a. Judge Torruella's dissent captured the

essence of the main issue that emerges at the completion of proceedings before the Court of Appeal:

> With due respect, there is no authority in law, practice, or maritime tradition that validates such action by the Coast Guard, nor am I aware of the government's having claimed such extraordinary powers before the inception of this case. Because the Coast Guard lacked the authority to remove the NORTHERN VOYAGER's master from his vessel against his will, the discretionary function exception relied upon by the government is inapposite

Pet. App. 41a.

REASONS FOR GRANTING THE PETITION

Is a citizen's life no longer in his own hands? Can the federal government use its legal power and physical force to compel a citizen to accept the government's "help?" Do "rescue" and "aid" really constitute that, if the recipient is not free to refuse them? Can the United States take a citizen into custody to force its "aid" upon him? Is the Coast Guard's authority to act without any limit?

This case raises these profound issues, because the decision of the First Circuit goes to the heart of the relationship of a citizen to his government. It declares that the United States *may* use force — or the threat of it — as well as legal compulsion, for no reason other than to prevent a competent adult from running a personal risk that he has freely chosen to face, a choice that places no one else's interests in peril. No other sovereign has such unbridled power, and a government of limited powers should not be a pioneer in adopting it.

This case has nothing to do with national security or crime. Moreover, petitioners have never claimed that the government had any affirmative duty to prevent the *Northern Voyager* from sinking. Instead, this case has always been about whether the ship and her officers, in the heat of fighting the flooding, were entitled simply to be left alone, free of Coast Guard interference with their damage-control efforts. The Coast Guard has never asserted any regulatory authority over this situation, and has never pointed to any purported authority for its actions, other than 14 U.S.C. §88. Petitioners fully respect the humanitarian zeal of the Coast Guard response personnel that led to the actions here. But this respect cannot change the fact that the decision they made here was simply not their call.

The keystone of the judgment below is the legal ruling that the phrase "may perform any and all acts necessary," as used in 14 U.S.C. §88, extends to Coast Guard field personnel the power to rescue people against their will. Without this rule of law, there is no authority for what the Coast Guard did here, and thus no discretion, and thus no recourse to the discretionary function exception, and thus no legal grounds for the government to escape liability for the loss of the ship.

The legal principle that the First Circuit stated has important and widespread implications for the marine industry nationally. Some mariners will avoid calling the Coast Guard, for fear of losing their vessel or suffering other unwanted interference; sooner or later, someone will be *too* reluctant to call the Coast Guard, and someone will get hurt.

The marine industry needs to know whether and when the Coast Guard may interfere in a distress situation. For example, a salvor could easily suffer the same fate as Captain

Haggerty, and the sinking of a vessel could deprive him of a salvage award under the traditional "no cure – no pay" arrangements of the salvage industry. This is a serious disincentive working against the zeal of salvors, on whom mariners in distress still depend today. More generally, this decision creates a serious rent in the uniformity of maritime law that this Court has endeavored to preserve. As Judge Torruella's dissent put it:

> The new, misguided doctrine promoted by the government in this appeal will have far reaching implications for the maritime and marine insurance industries. At a minimum, it will result in a shift in the decision-making responsibility for the safety and salvage of a ship from the person best qualified and most knowledgeable regarding his vessel, the master, to a governmental agency that, as well intentioned as it may be in its actions, is not even required by law to engage in any rescue attempt . . . . In effect, the Coast Guard is now empowered to arrive at the scene, forcibly remove the ship's captain, and leave the scene of the marine casualty without *any* duty of engaging in *any* attempt to save the vessel.
>
> Such a momentous shift in policy and such an extraordinary grant of authority should not be undertaken absent a clear legislative mandate expressed both in the text of the statute and in its legislative history. Ordinarily, major policy changes of this nature are the result of an unambiguous Congressional grant, written in plain language, enacted after considerable public hearings and input from the affected public, thus providing the courts with clear guidance in its judicial function. In this case, one looks in vain for such background or

> guidance. It is nowhere to be found. The government asks this Court to take a leap of faith based on its say, and with a dearth of authority.

The legal ruling that permitted the compulsory "rescue" of the mariners and that shielded the government from liability has broad significance. It stands at odds with the concept of a national government of limited powers and violates the Fourth and Fifth Amendments to the Constitution. It threatens instability in the interpretation of federal statutes generally, producing haphazard results in the realm of government tort liability. For these reasons, as amplified below, the Court should grant review of the First Circuit's decision.

I. THE FIRST CIRCUIT HAS DECIDED A FUNDAMENTAL ISSUE OF THE LIMITS OF FEDERAL POWER AND BASIC PERSONAL LIBERTIES AT CROSS PURPOSES WITH RECENT RULINGS OF THIS COURT

A. The First Circuit Has Contravened Important and Fundamental Limits On Federal Power Established By This Court

The decision below has serious constitutional significance because its legal rule takes the power of the national government into territory forbidden by this Court's federalism rulings.

In *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) and *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), this Court struck down two federal statutes designed to protect citizens from the criminal acts of others. It held that the Constitution did not authorize Congress to enact them, and

that the general police power belongs to the states alone. Undeterred by these authorities, the First Circuit has established a rule of *federal* power that does not merely seek to protect citizens from the conduct of *others*, but instead to protect them from *themselves*, that is, from natural risks they have freely chosen to face.

Its rule of law also takes federal power where even the states might fear to tread, in light of *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990). *Cruzan* was a so-called "right-to-die" case, dealing with a permanently unconscious patient. This Court's analysis proceeded from the assumption that the Constitution prohibited state employees from forcing a conscious and competent adult to accept medical treatment.

The federalism significance of this decision is heightened because the majority below — over a vigorous dissent — drew its authority solely from analogies to *state* statutes dealing with evacuations in the case of public emergencies. Pet. App. 22a-23a. In contrast to 14 U.S.C. §88, these state statutes confer authority to evacuate in express and unmistakable terms, and of course are grounded in the general police power or *parens patriae* power that the states alone possess.

In light of *Morrison*, *Lopez*, and *Cruzan*, this Court should grant certiorari to decide whether the Constitution permits *federal* officers to impose a "rescue" upon a competent but unwilling adult — a person whom, under *Cruzan*, a *state* presumably could not "rescue" through forcible medical intervention. Whether the power of the United States can reach this far is a deeply important federalism question that merits this Court's review.

B. The First Circuit Has Established a Rule of Law That Directly Contravenes the Seizure Provisions of the Fourth Amendment

The Court of Appeals acknowledged that a "forcible evacuation from a private vessel constitutes a seizure of the person." It also acknowledged that the action of the Coast Guard was thus subject to analysis under the U.S. CONST., amendment IV. Pet. App. 26a.

But the acts it upheld directly contravene this Court's rulings under the Fourth Amendment. The captain was told that if he did not leave the ship he would be "subdued." Pet. App. 7a. He was thus no longer at liberty to "walk away" from federal officers. This Court's precedents establish that such a seizure of the person triggers the requirement of a warrant or probable cause. *Kaupp v. Texas*, 538 U.S. 626, 123 S.Ct. 1843, 155 L.Ed.2d 814 (2003). Even as regards civil commitment of persons adjudicated as dangerous, this Court has enforced constitutional protections. *Kansas v. Crane* 534 U.S. 497, 122 S.Ct. 867, 151 L.Ed. 2d 856 (2002); *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed. 2d 501 (1997). A seizure in a civil context must withstand Fourth Amendment analysis, just as criminal arrest must do. *See, generally, Cruzan, supra*; *Soldal v. Cook County*, 506 U.S. 56, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992). Other circuits recognize that the Fourth Amendment requires probable cause to support a seizure of the person in civil contexts, such as in the mental health context. *See, e.g., Glass v. Mayas,* 984 F.2d 55, 58 (2d Cir.1993); *S.P. v. City of Takoma Park,* 134 F.3d 260, 266 (4th Cir.1998); *Gooden v. Howard County*, 954 F.2d 960, 968 (4th Cir.1992); *Villanova v. Abrams*, 972 F.2d 792, 795-96 (7th Cir.1992).

Dozens of federal statutes employ language of the kind in issue here. The implications of the rule that the First Circuit applied are thus widespread. This Court should grant review to decide whether it is reasonable under the Fourth Amendment for federal officers to seize the person of a competent adult, not suspected of any crime, and putting no one else at risk.

C. The First Circuit Has Interpreted Widely-Used Statutory Language So As To Violate This Court's Due-Process Requirement That Statutes Must Give Fair Notice

Government officers deprived the owners of their ship by depriving Haggerty, Tibbo, and Flaherty of their liberty. The law in the First Circuit is now that these deprivations were lawful. 14 U.S.C. §88 contains no other language remotely suggesting that federal officers may deprive citizens of their otherwise-existing liberties. By the reasoning of the First Circuit, *any* federal statute containing the words "perform any and all acts necessary," or words to that effect, now exposes citizens to loss of personal liberty, loss of life, and loss of property.

This Court's due process jurisprudence under U.S. CONST., amendment V, requires that statutes give citizens fair notice of adverse consequences at the hands of the government, through language clear enough for them to "navigate accordingly" — and also clear enough to dissuade arbitrary application of the statute:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable

> opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)(footnotes omitted). This Court continues to turn to *Grayned* as the Fifth Amendment standard for fair notice in statutes. *See, e.g., McConnell v. Federal Election Commission*, ___ U.S. ____, 124 S.Ct. 619, 675, 157 L.Ed.2d 491, 72 USLW 4015 (2003); *Chicago v. Morales*, 527 U.S. 41, 56-57, 119 L.Ed.2d 1849, 144 USLW 67 (1999). These protections apply to deprivations of Fifth Amendment interests, even outside the context of the criminal law. *See, e.g., Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980).

This case merits review to determine whether the words at issue really warn a citizen that — merely by calling the Coast Guard for help — he may suffer the loss of his liberty, his vessel, or even his life, all without a remedy.

Statutes throughout the United States Code use the phrase "perform any and all acts," or words to the same effect. The Court should also grant review because of the much wider implications of the First Circuit's decision as regards words of this kind appearing in the enabling statutes of other agencies.

II. THE FIRST CIRCUIT HAS DECIDED AN IMPORTANT AND PERVASIVE ISSUE OF FEDERAL STATUTORY CONSTRUCTION IN A MANNER THAT CONFLICTS WITH RULINGS OF THIS COURT AND OF OTHER CIRCUITS

Over a pointed dissent, the First Circuit ruled as follows:

> Under the circumstances, we think it reasonable to assume that Congress, in granting the Coast Guard the broad authority to undertake "any and all acts necessary to rescue and aid persons and protect and save property," intended to confer powers analogous to those commonly possessed by state public safety officials, namely, the power to rescue a person even against his will in life-threatening circumstances.

Pet. App. 25a. Without this conclusion, the government could not have escaped liability for the loss of the vessel. But the majority itself acknowledged there is no authority to support the notion that Congress meant to afford coercive power in 14 U.S.C. §88 — no judicial interpretation and no legislative history. Pet. App. 21a. The dissent pointed out some of the shortcomings of the majority's interpretation:

> A glance at identical language from analogous *federal* statutes reveals that Congress cannot have intended such "any and all acts" provisions to constitute an independent grant of unbounded authority. In nearly every instance in which Congress has granted an agency authority to "perform any and all acts necessary" to further some legislative goal, it is evident from the context that the provision grants an agency general implementary powers, but is not intended to expand the scope of that agency's powers "beyond those that may fairly be implied from the

> substantive sections and the functions there defined." *See PSC of New York v. FERC,* 866 F.2d 487, 492 (D.C.Cir.1989) (citing *Mobil Oil Corp. v. FPC,* 483 F.2d 1238 (D.C.Cir.1973)).

Pet. App. 46a-47a. (footnotes omitted).

This ruling of the First Circuit puts it and the Eleventh Circuit[1] at odds with this Court and with the other circuits, which hold that such phrases do not enlarge the powers that Congress otherwise granted to the agency. *See, e.g., Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380 (1974); *Kokajko v. FERC*, 873 F.2d 419, 423 (1st Cir. 1989); *PSC of New York v. FERC*, 866 F.2d 487, 492 (D.C.Cir.1989); *Southern Union Gas Co. v. FERC*, 725 F.2d 99, 102-3 (10th Cir. 1984); *New England Power Co. v. FPC*, 467 F.2d 425, 430-31 (D.C.Cir.1972), *aff'd*, 415 U.S. 345, 94 S.Ct. 1151, 39 L.Ed.2d 383 (1974); *Murphy Oil Corp. v. FPC*, 431 F.2d 805, 810 (8th Cir.1970); *Goshen Irrigation District v. Pathfinder Irrigation District,* 62 F.Supp.2d 1218, 1240 (D. Wyo. 1999).

As the dissent points out, comparable "necessary and appropriate" provisions occur repeatedly throughout the

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[1] In *Lewis v. United States*, No. 01-cv-821-J-25TEM (M.D. Fla. Jacksonville Division 2002) the government again argued that 14 U.S.C. §88 gives the Coast Guard wholesale discretion in any attempt at rescue at sea. The trial court agreed, and its opinion relied upon the district court opinion in this case, 214 F.Supp.2d 47 (2002). The Eleventh Circuit affirmed the dismissal in an unpublished opinion, No. 02-16450, November 20, 2003.

federal statutes.[2] There is no principled way for courts -- or citizens affected by a statute — to determine that Congress intended words of this kind to grant broad, invasive powers in *one* such statute, but not in another. For this reason, phrases of this kind are generally to be interpreted consistently through out the body of statutory law. A variable standard would "bring instability to statutory interpretation." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 117, 121 S.Ct. 1302, 1310, 149 L.Ed.2d 234 (2002).

Because words akin to those in 14 U.S.C. §88 occur so frequently in the United States Code, the First Circuit's legal rule opens the door to a real, but utterly unprincipled and erratic expansion of federal power, even at the expense of individual liberties. It creates a serious potential for overreaching by federal agencies, as the facts of this case —

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[2] The specific words employed are as varied as the subjects addressed, for example: 7 U.S.C. §3191: Secretary "may take such actions as are necessary" to obtain additional does of vaccine; 15 U.S.C. §631: Secretary "may take such steps as he may deem to be necessary" to achieve purposes of small business program; 15 U.S.C. §2824: Administrator "is authorized to take all steps necessary" to educate regarding fire safety; 16 U.S.C. §468c: Director authorized to "do any and all lawful acts necessary or appropriate" to carry out purposes of National Trust For Historic Preservation; 16 U.S.C. §590z-9: Secretaries of Interior and Agriculture are "authorized to perform any and all Acts . . . as may be necessary" to carry out conservation and utilization projects; 16 U.S.C. §756: Secretary of Commerce may "perform all other activities necessary" for conservation of fishstocks; 43 U.S.C. §373: Secretary "is authorized to perform any and all acts and to make rules and regulations necessary and proper" to implement reclamation program; 49 U.S.C. §40113: Secretary of Transportation may . . . perform acts as he shall deem necessary" to promote air safety.

and those cited above — show. It places random "wild cards" into the careful balance that Congress struck in the government tort liability statutes, which the government has continued to exploit. And it can only diminish public respect for the legal system.

This Court should grant the writ to avoid the "instability [in] statutory interpretation." that would otherwise result.

III. The First Circuit's Ruling Has Particular Importance Because It Will Tend To Destabilize An Important Facet Of Government Tort Liability

In reaching the judgment below, the First Circuit adopted a rule that destabilizes perhaps the most frequently litigated issue in government tort liability, the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. §2680(a). The exception has been implied into the Suits in Admiralty Act, 46 U.S.C. App. §742, and the Public Vessels Act, 46 U.S.C. App. §781, which were grounds for the suit here. The discretionary function exception is designed to shield the government from tort liability where the employee involved was authorized to balance considerations of "social, economic and political policy" in making the decision that resulted in the claimed harm. *United States v. Gaubert,* 499 U.S. 315, 323, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991); *Berkovitz v. United States,* 486 U.S. 531, 537, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988); *United States v. Varig Airlines,* 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984).

In reaching its judgment shielding the government from tort liability, the First Circuit interpreted 14 U.S.C. §88 to make virtually all distress-response conduct of the Coast

Guard unreviewable, by reason of the discretionary function exception.

But at least since *Indian Towing Company v. U.S.*, 350 U.S. 61 (1955), where its actions satisfy the Good Samaritan rule adopted in that case, the government has been held liable *despite* the discretionary function exception. 350 U.S at 65. Liability has been found in many circumstances, but as applied to a distress situation, the rule holds that a volunteer, attempting to help a victim, is liable if the volunteer makes the victim affirmatively worse off. *See*, Restatement (Second) of Torts §323 and §324A (1965). That criterion was satisfied here, because the summary judgment record below showed that removing the captain and officers from the *Northern Voyager* made her situation affirmatively worse than if these men had been left alone, and this resulted in her sinking. Pet. App. 8a. The latest rulings of this Court have treated *Indian Towing* as part of the jurisprudence of the discretionary function exception. *Berkovitz* analyzed the facts of *Indian Towing* to conclude that they fell outside the shield of the discretionary function exception, 486 U.S. at 547. *Gaubert* further refined the *Berkovitz* analysis. 499 U.S. at 1276. This Court has never turned back from *Indian Towing*'s adoption of the Good Samaritan rule.

For generations, the Good Samaritan rule has been the established measure of liability of the government for its distress-at-sea actions — as recently as in *Sagan v. United States*, 342 F.3d 493, 498 (6th Cir.2003), and at least as early as in *U.S. v. Gavagan*, 280 F.2d 319 (5th Cir. 1960). *See, e.g., Rodrigue v. U.S.*, 968 F.2d 1430 (1st Cir. 1992); *Huber v. U.S.*, 838 F.2d 398 (9th Cir. 1988); *U.S. v. Sandra & Dennis Fishing Corp.*, 372 F.2d 189 (1st Cir. 1967); *U.S. v. DeVane*, 306 F.2d 182 (5th Cir. 1962), *Hurd v. U.S.*, 134 F.Supp.2d 745 (D.S.C. 2001); *aff'd*, 34 Fed.Appx. 77, 2002

WL 730284 (4th Cir. 2002) *(unpublished); Fondow v. U.S.*, 112 F.Supp.2d 119 (D.Mass. 2000); *Wright v. U.S.*, 700 F.Supp. 490 (N.D.Ca. 1988); *Hood v. U.S.*, 695 F.Supp. 237 (E.D.La. 1988); *Miller v. U.S.*, 614 F.Supp. 948 (D.Me. 1985); *Daley v. U.S.*, 499 F.Supp. 1005 (D.Mass. 1980); *Lacey v. U.S.*, 98 F.Supp. 219 (D.Mass. 1951); *Frank v. U.S.*, 250 F.2d 178 (3rd Cir. 1957). It has been accepted as the guidepost, whether the plaintiff's case eventually succeeded or failed on its facts. Its reach is not limited to the Coast Guard: *Rodrigue, supra*, dealt with the Air Force, and *Miller* dealt with the Navy.

Until now, where the facts in a distress-at-sea case satisfied the Good Samaritan rule, each time the discretionary function exception has been raised it has been rejected. *Gavagan, supra*, 280 F.2d at 328; *Huber, supra*, 838 F.2d at 400-01; *Hurd, supra*, 134 F.Supp.2d at 769. These cases hold that facts that satisfy the Good Samaritan rule represent actions of a kind that are beyond the protection of the discretionary function exception — the very reasoning of *Indian Towing*, as analyzed in *Gaubert* and *Berkovitz*.

By interpreting 14 U.S.C. §88 to afford the Coast Guard wholesale discretion, the First Circuit stands at odds with the whole of this jurisprudence. Its ruling means that the Coast Guard must virtually always be held free from liability in distress at sea cases, no matter how egregious its conduct.[3]

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[3] The majority sought to place a qualifier on the most extreme consequences of its reasoning. It held that the government's coercive power would be limited to circumstances of an objective belief in danger to human life. But as the dissent pointed out, this kind of "halfway point" is fully at odds with the jurisprudence of the discretionary function exception — once an action is held to partake of any protected discretion, all further judicial inquiry must

This would mean, in turn, that the cases as early as *Gavagan, supra*, in 1960, and as late as *Sagan, supra*, decided last year, were wrong to have held the Coast Guard liable. But these effects would be haphazard. For example, the Air Force, as in *Rodrigue, supra*, and the Navy, as in *Miller, supra*, would remain exposed to tort liability — as before — because the rescue activities of those agencies do not happen to be covered by a statute that includes the key phrase "perform any and all acts."

The Eleventh Circuit has joined the First Circuit in exonerating the government through the discretionary function exception, by interpreting 14 U.S.C. §88 to grant the Coast Guard complete discretion. See footnote 1, *supra*.

But consequences go much farther than just distress-at-sea cases.

The *Indian Towing/Berkovitz/Gaubert* test for applying the discretionary function exception comes up in countless contexts, across the spectrum of federal activity, embracing, for example, the work of the Bureau of Reclamation (*Kennewick Irr. Dist. v. U.S.*, 880 F.2d 1018, 1031 (9th Cir. 1989)); the Army Corps of Engineers (*Theriot v. U.S.*, 245 F.3d 388 (5th Cir. 1998)); and the National Oceanographic and Atmospheric Administration (*Brown v. U.S.*,790 F.2d 199 (1st Cir. 1986)), to name just a few. But under the reasoning of the First Circuit, whenever an agency's authorizing statute includes the phrase "perform any and all acts," or words to similar effect, the government has unbounded discretion and is thus shielded from tort liability for the acts of that agency. There is no principled way to

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cease. Pet. App. 48a-49a.

prevent such results, if the decision below rests on the proper view of the law.

In his concurring opinion in *Gaubert*, Justice Scalia observed that the lower courts have had difficulty in setting the limits the discretionary function exception. *Gaubert* at 335. The decision of the First Circuit can only amplify that difficulty.

This Court should review this case to reject the legal rule adopted by the First Circuit at odds with this Court's rulings, and to resolve the differences between the circuits as to interpretation of federal statutes, particularly in light of the serious non-uniformity in government tort liability that flows from it.

CONCLUSION

For the foregoing reasons, the petitioners respectfully pray that the Court grant review of this matter.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 02-1619, No. 02-1620

[Filed January 26, 2004]

THAMES SHIPYARD AND REPAIR COMPANY,
Plaintiff in Cross Claim, Appellant,

v.

UNITED STATES,
Defendant, Appellee.

NORTHERN VOYAGER LIMITED PARTNERSHIP; ONEBEACON AMERICA INSURANCE COMPANY f/k/a/ COMMERCIAL UNION INSURANCE COMPANY,
Plaintiffs, Appellants,

v.

UNITED STATES,
Defendant, Appellee.

Before Boudin, Chief Judge, Campbell and Stahl, Senior Circuit Judges, Torruella, Selya, Lynch, Lipez, and Howard, Circuit Judges.

Order of Court

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the court in regular, active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

Judge Torruella and Judge Lipez voted to grant rehearing en banc. Judge Torruella dissented from the denial of rehearing en banc in an opinion which follows.

DISSENT

Torruella, Circuit Judge (dissenting). In my thirty years as a judge, I cannot recall a case that more squarely falls within the provisions of Fed. R. App. P. 35(a)(2) as meriting en banc review, particularly when one considers the unprecedented nature of the authority conceded to the Coast Guard by the panel opinion and the lack of any authority supportive of its conclusion. The failure to grant en banc review is likely to cause the bar to lose its bearings when it compares the exceptional importance of the issues presented in this appeal with those raised in other cases in which en banc review has been granted by this court. In my view, the full active court should hear and decide this appeal affecting the entire maritime and maritime insurance industries. Given

the failure of this court to so act, the matter deserves consideration by the Supreme Court, and petitioners are urged to seek such relief.

By The Court:

/s/_____
Richard Cushing Donovan, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 02-1619, No. 02-1620

[Filed November 26, 2003]

THAMES SHIPYARD AND REPAIR COMPANY,
Plaintiff in Cross Claim, Appellant,

v.

UNITED STATES,
Defendant, Appellee.

NORTHERN VOYAGER LIMITED PARTNERSHIP; ONEBEACON AMERICA INSURANCE COMPANY f/k/a/ COMMERCIAL UNION INSURANCE COMPANY,
Plaintiffs, Appellants,

v.

UNITED STATES,
Defendant, Appellee.

Appeals from the United States District Court
for the District of Massachusetts
Hon. Rya W. Zobel, U.S. District Judge

Before Torruella, Circuit Judge, Campbell and Stahl, Senior Circuit Judges

OPINION

CAMPBELL, Senior Circuit Judge.

Plaintiffs-appellants Northern Voyager Limited Partnership ("Northern Voyager") and OneBeacon America Insurance Company, along with cross claim plaintiff-appellant Thames Shipyard and Repair Company ("Thames Shipyard") appeal from the district court's award of summary judgment in favor of defendant-appellee United States in an action related to the 1997 sinking of the F/V NORTHERN VOYAGER ("NORTHERN VOYAGER") in waters off Gloucester, Massachusetts. This Court reviews de novo a district court's grant of summary judgment, affirming the judgment only if there is no genuine issue of material fact and if the appellee is entitled to judgment as a matter of law. *Yohe v. Nugent*, 321 F.3d 35, 39 (1st Cir. 2003). We recount the history of this case in the light most favorable to the losing parties (the plaintiffs-appellants) and then address the principal questions presented.

I.

A. The Sinking of the NORTHERN VOYAGER

On the morning of November 2, 1997, the NORTHERN VOYAGER, a 144-foot fishing vessel, was proceeding a few miles off the coast of Gloucester, Massachusetts when

crewmen discovered water flooding a compartment in the ship's stern. The flooding, which resulted when the starboard rudder dropped out of the vessel, was severe and the crew immediately began trying to pump out the water. Despite the crew's best efforts, the water level in the compartment continued to rise, threatening to flood the boat's engine room. If the engine room flooded, all of the NORTHERN VOYAGER's electrical pumps and generators located inside would be rendered useless.

The situation was such that the master of the NORTHERN VOYAGER, Captain David Haggerty, radioed Coast Guard Station Gloucester, told them that "[w]ater [was] coming in fast," and requested that they "get some pumps out to [the ship]." To complicate matters, a storm had passed through the area the night before, leaving swells of roughly six to eight feet. Station Gloucester (under the command of Chief Warrant Officer Wesley Dittes) responded immediately by launching a 41-foot boat, to be followed shortly thereafter by a 47-foot one. The Coast Guard also diverted a 110-foot cutter, the ADAK, to assist as On Scene Coordinator. Coast Guard Group Boston, which is organizationally superior to Station Gloucester, assumed the role of Search and Rescue Mission Coordinator.

The 41-footer arrived on the scene at approximately 9:15 a.m. and immediately evacuated eight crew members who apparently requested to leave the NORTHERN VOYAGER, leaving on board of the original crew Captain Haggerty, the engineer, and the first mate. Two Coast Guardsmen, Petty Officers Adam Sirois and Brian Conners, boarded the NORTHERN VOYAGER and attempted to assist in continuing efforts to remove water from the ship using extra pumps supplied by the Coast Guard. Although what was done slowed the rate of water accumulation, the flooding continued

and the NORTHERN VOYAGER began to develop a port side list.

As the NORTHERN VOYAGER rolled and began to list, Coast Guard Officer Dittes (aboard the 47-footer), Group Boston, and the On Scene Coordinator began discussing the possibility that the vessel would need to be evacuated. Several factors worried Dittes. His most immediate concern was that the vessel's port side tilt made both access to and escape from the NORTHERN VOYAGER more difficult. This is because the fishing boat's only access port, a door from the shelter deck through which the crew boarded and departed from the boat, was on the starboard side. As the fishing boat tilted more and more to port, the starboard side was raised higher and higher off the surface of the water. No less worrisome was his concern about progressive flooding, which was causing the vessel to settle further in the water, with the danger that the boat would capsize without warning before it sank, trapping anyone aboard before they could be rescued.

Based upon these concerns, Dittes's conversations with NORTHERN VOYAGER crew members who had already boarded the 47-footer, and the continual progression of the flooding, Dittes ordered his men to evacuate the NORTHERN VOYAGER's remaining crew members. Captain Haggerty opposed the Coast Guard's decision to evacuate his vessel and wanted to talk about other options for pumping and salvage, including commercial salvage.

Dittes and Conners refused to discuss any other options for salvage aboard the NORTHERN VOYAGER, and, again, ordered Haggerty and his men off the boat. According to Captain Haggerty, Conners informed him that if he did not cooperate, the Coast Guard would "subdue [him] physically" in order to take him off the NORTHERN VOYAGER. All

Coast Guard personnel and the remaining NORTHERN VOYAGER officers were then transferred to the Coast Guard 47-footer.

The NORTHERN VOYAGER was abandoned at 10:27 a.m., continued to sink, and capsized at 11:22 a.m., fifty-five minutes after the last person left the vessel. Captain Haggerty did not want to stay around and watch the boat sink. Accordingly, shortly after the evacuation, the Coast Guard 47-footer headed back to Station Gloucester with Captain Haggerty and the remaining members of his crew on board.

According to plaintiffs' experts, there were various steps that Captain Haggerty and his senior crew could have taken to stabilize the situation if the Coast Guard had permitted them to stay on the vessel. These steps included shutting certain doors and making them watertight so that the flooding was confined to two compartments in the stern of the boat. If these steps had been taken, plaintiffs' experts asserted, the vessel could have floated for at least another twenty hours even assuming that no pumping capacity was brought to bear. This would have provided ample time for independent salvage resources to reach the vessel, even if they had to come from as far away as Boston.

B. Alternative Salvage Efforts Were Underway

While Coast Guard rescue efforts were underway, radio traffic about the NORTHERN VOYAGER was overheard by a commercial salvor named Michael Goodridge based in Newburyport, Massachusetts. At 9:03 a.m., just minutes after Captain Haggerty first radioed for Coast Guard assistance, Goodridge placed a telephone call to Station Gloucester. He told them that he had dive gear and pumps and asked whether

they needed assistance. Station Gloucester responded that they were busy and they were going to "handle it."

At 9:04 a.m., Captain Haggerty informed the Coast Guard by radio that he thought the water was coming up through the vessel's rudder-post. He conjectured that the NORTHERN VOYAGER "might ah, dropped the rudder." Earlier, he had explained that the vessel had lost its steering capability.

Several minutes later, the Coast Guard transmitted an Urgent Marine Information Broadcast stating that it "ha[d] received a report that the Fishing Vessel Voyager is taking on water" and requesting that "all vessels keep a sharp lookout, assist if possible, [and] report all sightings to the U.S. Coast Guard." This was the Coast Guard's only attempt to solicit outside assistance.

Himself a diver, Goodridge, who continued to monitor developments over his radio, recognized that the "vessel was going to need a diver to correct the problem." Accordingly, he began loading up his truck. At 9:15 a.m., Goodridge placed a telephone call to Cape Ann Divers to see if anyone was available to assist him. At 9:33 a.m., he reported to Station Gloucester that he was en route, with diving gear, and that his estimated time of arrival was one hour.

At 10:03 a.m., several minutes before the decision to evacuate was made, Goodridge hailed Station Gloucester on radio channel 16. He was told to switch to channel 12, a frequency not being used by anyone on the scene. Goodridge stated that he was boarding a vessel at Cape Ann Marina, and asked if he should bring extra pumps or whether just diving assistance was necessary.

Station Gloucester responded that it "wasn't sure," the situation was unstable, and it needed to keep "[the] frequency clear."[1] Goodridge interpreted this to mean that he shouldn't tie up the channel. He stated that he would be there "in a little bit," and he got off the radio. Shortly thereafter, everyone was evacuated from the NORTHERN VOYAGER.

At about 10:44 a.m., when Goodridge was about a mile from the Northern Voyager, he contacted Station Gloucester by radio hoping to establish contact with the captain. At that point, Goodridge had just seen the 47-footer heading back with the crew. Station Gloucester told him to call by "land line." When Goodridge called back on his cellular phone, he was told that he could talk to the captain when he arrived back at the station.

Goodridge said that he did not attempt to contact the 47-footer directly because he had "[b]een told twice to stay off the radio." He didn't bother going to the station to talk to the captain because he assumed that, based on the Coast Guard reports, the boat was too far gone for him to take the necessary time.

According to plaintiffs' expert, Goodridge was in a position to reach the NORTHERN VOYAGER by 10:50 a.m., well before it sank. Goodridge stated at his deposition that he had the skill and equipment necessary to dive under the NORTHERN VOYAGER and plug the hole formerly

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[1] The comment about the need to keep the frequency clear was conceded by the Coast Guard employee who made it to be a misstatement. The Coast Guard employee said that it was a "bad choice of words," that Goodridge's contact came at a time when she needed to listen, and that what she should have done was to ask Goodridge to "wait out."

containing the rudder post, and the task would have taken him only a couple minutes.[2] However, he needed to talk to somebody in the NORTHERN VOYAGER crew before making such an attempt in order to find out if the engines were running. Without this knowledge, it was too risky to dive near the propellers, as he would have had to do to plug the rudder tube.

Captain Haggerty stated that he did not know any commercial salvors in the Gloucester area and thought that the Coast Guard was working on getting commercial assistance. At no time before the captain was put ashore in Gloucester, however, did he learn, nor was he told by the Coast Guard, that a salvor was approaching with additional pumps and with dive gear.[3] If the captain had been in contact with Goodridge and had been made aware of his concerns about the engine running, the captain would have shut off the engines before evacuating, rigged a Jacobs ladder in order to facilitate a possible return to the boat, and communicated this information to Goodridge.

C. Proceedings in the District Court

Northern Voyager, its insurers, and Thames Shipyard brought this action in the District of Massachusetts against the United States alleging that the sinking of the NORTHERN

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[2] Plaintiffs' expert stated that there were many available objects, such as a lobster buoy or life jacket, that Goodridge could have used to plug the hole and that this would have stopped, or at least considerably reduced, the influx of sea water.

[3] The record contains conflicting evidence on this point, but we, of course, take the evidence in the light most favorable to the losing party.

VOYAGER was due to the negligence of the Coast Guard. Plaintiffs' primary contention was that the Coast Guard exceeded its authority by coercively compelling the NORTHERN VOYAGER's master to leave the vessel against his will. Plaintiffs further alleged that the Coast Guard negligently interfered with the efforts of Michael Goodridge, the commercial salvor, and also deprived the NORTHERN VOYAGER of other possible sources of assistance in its time of peril.[4]

The United States contended that the Coast Guard was legally authorized to issue the evacuation order by virtue of the broad search and rescue powers conferred upon the Coast Guard by Congress under 14 U.S.C. § 88 to "perform any and all acts necessary to rescue and aid persons . . . " *See* note 7, *infra*. It further argued that the decision to issue the order in these circumstances was a decision protected under the discretionary function exception. The United States moved for summary judgment on the grounds that the suit was barred by the exception. In respect to plaintiffs' arguments that the Coast Guard negligently interfered with the commercial salvor's efforts, the United States contended that these arguments failed under the "Good Samaritan" doctrine requiring a would-be rescuer to have worsened the victim's position.

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[4] In addition, plaintiffs alleged various intentional torts including trespass to chattels, conversion, breach of fiduciary obligations, bailment, and intentional interference with contractual and/or advantageous relations. Our discussion, *infra*, concluding that the Coast Guard's evacuation decision is protected by the discretionary function exception disposes of most of these claims. We do not think that the alleged facts support a claim of intentional interference with contractual or advantageous relations.

The district court concluded that the Coast Guard's decision to compel Haggerty and his crew to abandon the NORTHERN VOYAGER was protected by the discretionary function exception. *Northern Voyager Ltd. P'ship v. Thames Shipyard & Repair Co.*, 214 F. Supp. 2d 47, 52 (D. Mass 2002). Though the court did not cite to or evaluate the scope of 14 U.S.C. § 88, it did cite internal government manuals as stating the need for broad discretion and flexibility when conducting search and rescue operations. *Id.* Applying the discretionary function test articulated in *Berkovitz v. United States*, 486 U.S. 531, 537, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988), the court concluded that (1) the Coast Guard has complete discretion over all search and rescue procedures; and (2) the Coast Guard's decision to evacuate the NORTHERN VOYAGER is the type of "policy based discretion" protected by the exception. *Id.* at 51-52. Once it concluded that plaintiffs' claims are barred by the discretionary function exception, the court granted the United States' motion for summary judgment.

This appeal followed.

II.

The United States, as sovereign, is immune from suit except as it consents to be sued, and the terms of its consent define the federal courts' jurisdiction over suits against the United States. *United States v. Sherwood*, 312 U.S. 584, 586, 61 S. Ct. 767, 85 L. Ed. 1058 (1941). The Suits in Admiralty Act ("SAA") waives sovereign immunity "in cases where if such vessel were privately owned or operated . . . or if a private person or property were involved, a proceeding in admiralty could be maintained . . ." 46 U.S.C. Appx. § 742. The Public Vessels Act ("PVA") allows recovery against the

United States for damages "caused by a public vessel of the United States . . ."[5] 46 U.S.C. Appx. § 781.

Both waiver provisions apply here. *See Wilson v. United States*, 23 F.3d 559, 561 (1st Cir. 1994) ("Both the [SAA] and the [PVA] apply where a plaintiff brings a 'public-vessel-related suit in admiralty against the United States.'") (internal citation omitted). Although neither contains an express discretionary function exception, it has been implied into both. *See Limar Shipping Ltd. v. United States*, 324 F.3d 1, 6-7 & n.3 (1st Cir. 2003) (*SAA); United States Fire Ins. Co. v. United States*, 806 F.2d 1529, 1534-35 (11th Cir. 1986) (PVA) (reasoning that the "separation of powers" concerns that justify reading a discretionary function exception into the SAA warrant reading the same exception into the PVA, especially given the close relationship between the two statutes). We review de novo the lower court's determination that the Coast Guard's actions are protected by the discretionary function exception. *See Wood v. United States*, 290 F.3d 29, 36 (1st Cir. 2002).

A. The Discretionary Function Exception: the Standard Test

The purpose of the discretionary function exception is to insulate certain governmental actions and decisions based on considerations of public policy from tort liability by private individuals. *Berkovitz*, 486 U.S. at 536-37. The exception is

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[5] The PVA embraces cases where injury is caused by the crew of a public vessel and not by the vessel itself. *See Coumou v. United States*, 107 F.3d 290, 294 n.9 (5th Cir.), *modified*, 114 F.3d 64 (5th Cir. 1997); *Harrington v. United States*, 748 F. Supp. 919, 929 (D.P.R. 1990).

intended to preclude "judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy." *Limar Shipping*, 324 F.3d at 6 (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984)). Thus, the discretionary function exception "insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment." *Berkovitz*, 486 U.S. at 537.

Where, as here, the government avers that it is immune from suit because the challenged conduct falls under the protection of the discretionary function exception, we must determine whether the disputed conduct involved the "permissible exercise of policy judgment." *Berkovitz*, 486 U.S. at 539. In a series of cases, the Supreme Court has established an analytical framework for determining whether the conduct warrants discretionary function immunity.

The court must initially identify the conduct that allegedly caused the harm. *United States v. Gaubert*, 499 U.S. 315, 322, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991). Then, to determine whether the exception applies, the court employs a two prong test. First, the court must determine whether the challenged conduct involves an element of judgment, meaning that it is "a matter of choice for the acting employee." *Berkovitz*, 486 U.S. at 536. This Court has declared that conduct is non-discretionary "if a federal statute, regulation, or policy specifically instructed federal officials to follow a specified course of action." *Muniz-Rivera v. United States*, 326 F.3d 8, 15 (1st Cir.), *cert. denied*, 2003 U.S. LEXIS 6985, 124 S. Ct. 224, 157 L. Ed. 2d 134, 2003 WL 21692180 (U.S. Oct. 6, 2003) (No. 03-25). Second, the court "must determine whether that judgment is of the kind that the discretionary function was designed to shield," meaning that

it involved "governmental actions and decisions based on considerations of public policy." *Berkovitz*, 486 U.S. at 536-37.

In addition, courts have read the Supreme Court's discretionary function cases as denying protection to actions that are unauthorized because they are unconstitutional, proscribed by statute, or exceed the scope of an official's authority. *See, e.g., K. W. Thompson Tool Co. v. United States*, 836 F.2d 721, 727 n.4 (1st Cir. 1988) ("It has been held that implicit in *Varig* and *Dalehite* is the proposition that a 'decision cannot be shielded from liability if the decisionmaker is acting without actual authority.'") (quoting *Red Lake Band of Chippewa Indians v. United States*, 255 U.S. App. D.C. 162, 800 F.2d 1187, 1196 (D.C. Cir. 1986)); *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001) (stating that "[f]ederal officials do not possess discretion to violate constitutional rights or federal statutes") (quoting *United States Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988)); *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) ("[G]overnmental conduct cannot be discretionary if it violates a legal mandate."); *Myers & Myers, Inc. v. United States Postal Service*, 527 F.2d 1252, 1261 (2d Cir. 1975) ("It is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority.").

B. The Decision to Forcibly Evacuate the NORTHERN VOYAGER.

Following this framework, we focus on the decision to forcibly evacuate the NORTHERN VOYAGER. Relying on *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955), and *United States v. Sandra &*

Dennis Fishing Corp., 372 F.2d 189 (1st Cir. 1967), appellants contend that the discretionary function exception applies to decisions whether or not to undertake a rescue mission but not to decisions made during the course of a rescue mission once undertaken. Appellants further contend that the Coast Guard's evacuation decision was not a policy decision. Finally, appellants argue that the government cannot seek refuge in the exception because the forcible evacuation was outside the scope of its statutorily-delegated authority and, indeed, violated legal and constitutional norms. We disagree.

1. Whether *Indian Towing* and *Sandra & Dennis Fishing Corp.* Preclude Application of the Discretionary Function Exception to the Decision at Issue.

We begin by addressing plaintiffs' argument based on *Indian Towing* and *Sandra & Dennis Fishing Corp.* For the following reasons, we do not think that these cases support plaintiffs' argument that the discretionary function exception is inapplicable to decisions made during the course of a rescue mission to the extent those decisions implicate protected policy concerns.

Indian Towing involved a lawsuit alleging that the Coast Guard negligently failed to maintain a lighthouse, causing the loss of a ship. The Court held that the Coast Guard need not undertake to provide lighthouse service. *Indian Towing*, 350 U.S. at 69. However, having "exercised its discretion to operate [the] light . . . and engendered reliance on the guidance afforded by the light, [the Coast Guard] was obligated to use due care to make certain that the light was kept in working order." *Id.*

Indian Towing is inapposite for two reasons. First, the discretionary function exception was not at issue because the government conceded that it did not apply. *Id.* at 64. Second, as this Court has interpreted the case, through the lens of later Supreme Court decisions, it illustrates a situation where there was no exercise of policy judgment but rather involved purely technical or scientific considerations. *Ayer v. United States,* 902 F.2d 1038, 1042 (1st Cir. 1990). Indeed, we have suggested that had a policy-based reason for failing to maintain the lighthouse been articulated, the result might have been different. *See id.*

In *Sandra & Dennis Fishing Corp.*, a Coast Guard patrol boat took in tow a fishing vessel that was then in no immediate danger of sinking and, through negligence (human error), caused the vessel to strand on a shoal. This Court stated that the Coast Guard had no duty to provide rescue services on demand. *Sandra & Dennis Fishing Corp.*, 372 F.2d at 195. However, we held that "if the Coast Guard accepts a mission it should conduct its share of the proceeding with acceptable seamanship." *Id.* at 197.

There is no hint in *Sandra & Dennis Fishing Corp.* that the government attempted to rely on the discretionary function exception. Nor is there any reason to think that the negligent conduct upon which this Court affirmed liability (the failure to check with the loran on the towed vessel when the loran on the Coast Guard patrol boat went out) implicated protected policy concerns as opposed to mere technical, navigational missteps. Accordingly, neither *Indian Towing* nor *Sandra & Dennis Fishing Corp.* stand for the proposition that a Coast Guard determination made during the course of a mission may not be protected by the discretionary function exception in otherwise appropriate circumstances.

Indeed, to hold differently could be said to fly in the face of the Supreme Court's decision in *Gaubert*, 499 U.S. at 325-26, which rejects a distinction between initiation of programs and decisions made at an operational level. *See also Varig Airlines*, 467 U.S. at 813 ("[T]he basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee--whatever his or her rank--are of the nature and quality that Congress intended to shield from tort liability.") Accordingly, we turn next to the familiar two-prong inquiry, *supra* p. 14-15, under *Berkovitz* and progeny. For the following reasons, we conclude that both prongs are met.

2. Application of the Two-Prong Inquiry.

First, the Coast Guard has statutorily-granted discretion to exercise its judgment in determining how it goes about search and rescue ("SAR") operations. *See* 14 U.S.C. § 88 (providing that the Coast Guard *may* perform any and all acts necessary to rescue and aid persons and property). Further, internal manuals recognize the discretionary nature of decisions made during the course of SAR operations. The National Search and Rescue Manual notes that "[b]ecause of the many variables encountered during SAR operations and the individuality of each SAR case, the guidance provided in this Manual must be tempered with sound judgment, having due regard for the individual situation." 1 Joint Chiefs of Staff & U.S. Coast Guard, *National Search and Rescue Manual* v, § 3.a (1991). The Coast Guard Addendum to this manual provides that "Coast Guard personnel are expected to exercise broad discretion in performing the functions discussed." U.S. Coast Guard, *Coast Guard Addendum to the National Search and Rescue Manual* at 2.

Second, the determination that the peril to the endangered seamen had reached such a level as to require a forced evacuation involved a true policy choice. This case does not fall within the "line of cases involving plaintiffs who challenge official judgments that implicate technical safety assessments conducted pursuant to prior choices." *Shansky v. United States*, 164 F.3d 688, 694 (1st Cir. 1999). "Such decisions come within a category of objective professional judgments that, without more, are not readily amenable to policy analysis." *Id.* Rather, it involved the balancing of incommensurable values -- such as human safety, protection of property, autonomy, and the allocation of resources -- typically associated with policy decisions.[6] *See id.* at 695. The Coast Guard's manual sets forth a policy of giving priority to the saving of human lives over the saving of property. *See infra* p. 25. Applying such a policy in circumstances of danger such as these calls for an evaluation of multiple factors that is anything but purely technical and routine.

3. The Scope of 14 U.S.C. § 88.

Finally, we turn to appellants' contention that the discretionary function exception does not apply because the Coast Guard acted outside the scope of its statutorily-granted authority or in derogation of other constitutional and legal

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[6] The last factor (allocation of resources) comes into play especially because, despite appellants' suggestion to the contrary, the Coast Guard, once on the scene, would have been hard pressed simply to abandon the imperilled seamen. If the ship had capsized, trapping the men inside or putting them overboard, the Coast Guard would have been faced with a riskier, more costly rescue operation that might have endangered the lives of Coast Guard personnel seeking to rescue those members of the NORTHERN VOYAGER's crew who had elected to remain on board.

principles. This argument requires us to determine whether 14 U.S.C. § 88, which provides inter alia that the Coast Guard may perform "any and all acts necessary to rescue and aid persons and protect and save property," permits the Coast Guard, when it deems such action necessary to protect lives, to compel an unwilling master to evacuate his vessel.[7] This is a novel question in that, while similar events may have arisen in the past, no federal cases interpreting the Coast Guard's powers in this regard appear to exist in the law books, nor have any specific regulations been promulgated on the subject by the Coast Guard. Moreover, the legislative history of § 88 does not address this particular issue.[8] On the one hand, the

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[7] The pertinent part of § 88 provides in full:

> (a) In order to render aid to distressed persons, vessels, and aircraft on and under the high seas and on and under the waters over which the United States has jurisdiction and in order to render aid to persons and property imperiled by flood, the Coast Guard may: (1) perform any and all acts necessary to rescue and aid persons and protect and save property; (2) take charge of and protect all property saved from marine or aircraft disasters, or floods, at which the Coast Guard is present, until such property is claimed by persons legally authorized to receive it or until otherwise disposed of in accordance with law or applicable regulations, and care for bodies of those who may have perished in such catastrophes; (3) furnish clothing, food, lodging, medicines, and other necessary supplies and services to persons succored by the Coast Guard; and (4) destroy or tow into port sunken or floating dangers to navigation.

[8] Section 88 was added to Title 14 in 1949. *See* Act of Aug. 4, 1949, c. 393, 63 Stat. 501. The Senate Report that accompanied the legislation explains that previous "statutes were enacted over a

statute's literal language (empowering the Coast Guard to "perform any and all acts necessary to rescue and aid persons . . . ") can be said literally to encompass such action. On the other, in our democratic society the circumstances are limited in which governmental officials may legally compel people, against their will, to abandon their homes or other private property. If it were unconstitutional or contrary to clear law for the Coast Guard to rescue unwilling mariners in life-threatening situations, we would be loath to read such authority into § 88.

Given the dearth of federal authority, we turn to state law and practice in analogous rescue situations for guidance. Almost every state in the United States has adopted statutes providing for the exercise of police powers in the event of an emergency or disaster (such as fire, flood, tornado, hurricane, etc.) *See* Howard D. Swanson, *The Delicate Art of Practicing Municipal Law Under Conditions of Hell and High Water*, 76 N.D.L. Rev. 487, 490-93 & n.10 (2000) (citing statutes). Most of the state statutory schemes provide that the governor of the state has the ability to declare an emergency. *See id.* at 490. "Further, most of the states also allow the exercise of

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period of a century and covered, in some cases, only limited geographical areas, and in other cases only limited types of assistance work," and that "section 88 authorizes the Coast Guard, in the broadest possible terms without limitation as to method or place, to save lives and property." S. Rep. No. 81-656, at 5 (1949), *reprinted in* 1949 U.S. Code & Cong. Serv. 1652, 1656. This history suggests that the phrase "any and all acts" defines the scope of Coast Guard authority and, is not, as plaintiffs contend, merely an implementary provision. Further, it is plain that Congress intended the scope of this power to be broad. Nonetheless, nothing in the legislative history specifically addresses the power to order forcible evacuation.

emergency or disaster authority by a local government." *Id.* One of the most common forms of authority exercised in an emergency is the mandatory evacuation of buildings, streets, neighborhoods, and cities. *Id.* at 495, *see also* David G. Tucker & Alfred O. Bragg, III, *Florida's Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 Stetson L. Rev. 837, 838 (Winter 2001) ("Local decision-makers may be called upon to order evacuations or prevent people from returning to damaged houses.").

In some states, there are statutes that expressly delegate to local safety officers the authority to order evacuations in an emergency. *See, e.g.*, Alaska Stat. § 18.70.075(a)(2) (providing that a fire officer has the authority to "order a person to leave a building or place in the vicinity of a fire or emergency, for the purpose of protecting the person from injury"); Conn. Gen. Stat. § 7-313b (similar); Del. Code Ann. tit. 16, § 6701A(2) (similar); N.H. Rev. St. Ann. § 154:7 (similar); Tenn. Code Ann. § 6-21-703 (similar); W. Va. Code § 29-3A-1 (similar). In other states, where the issue is not expressly addressed in any statute, the authority of a safety officer to order an evacuation has been inferred from a statute delegating general authority "to preserve the public peace." *See, e.g.*, Ohio Op. Atty. Gen. No. 87-099 (reasoning in this way and opining that a sheriff "may order the evacuation of persons residing . . . in the vicinity of a hazardous materials accident or emergency, when reasonably necessary for the protection of the health, safety, and well-being of such persons" and "may, in a reasonable manner, remove to a safe area any persons who refuse to evacuate voluntarily").[9]

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[9] We have no doubts about the constitutionality of such authority. Courts have rejected due process challenges to summary

The Coast Guard is a governmental agency and has been granted by Congress a variety of public safety responsibilities and powers, including, of course, the specific power under discussion to rescue and aid persons and property.[10] In exercising its rescue powers, it construes its own role as giving priority to the saving of lives over the saving of property. *See* U.S. Coast Guard, *Boat Crew Seamanship*

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action taken in an emergency situation, *see, e.g., Hodel v. Virginia Surface Min. & Recl. Assn.*, 452 U.S. 264, 299-301, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981) (upholding the constitutionality of an emergency procedure which allowed government inspectors to order the immediate cessation of mining activities), and have similarly rejected Fourth Amendment challenges to police action taken in response to a life-threatening emergency. *See, e.g., Mincey v. Arizona*, 437 U.S. 385, 392, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) ("Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid.") (internal footnotes omitted) (citing cases); *see also Wayne v. United States*, 115 U.S. App. D.C. 234, 318 F.2d 205, 212 (D.C. Cir. 1963) (Burger, J.) ("The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.").

[10] *See, e.g.*, 14 U.S.C. § 2 ("Primary Duties") (stating, *inter alia*, that the Coast Guard "shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department" and "shall develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, icebreaking facilities, and rescue facilities for the promotion of safety on, under, and over the high seas and waters subject to the jurisdiction of the United States").

Manual at 18-92. In circumstances such as the present, Coast Guard operations are relevantly different from the situation in which a private vessel or a commercial salvor comes to the aid of a distressed vessel.[11] Under the circumstances, we think it reasonable to assume that Congress, in granting the Coast Guard the broad authority to undertake "any and all acts necessary to rescue and aid persons and protect and save property," intended to confer powers analogous to those commonly possessed by state public safety officials, namely, the power to rescue a person even against his will in life-threatening circumstances.

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[11] It is a general principle of admiralty law that an owner of a vessel has a right to decline salvage assistance and that "a salvor who acts without the express or implied consent of the owner is a 'gratuitous intermeddler' who is not entitled to any salvage award." 2 Thomas J. Schoenbaum, *Admiralty & Maritime Law* § 16-1 at 360-61 (3d ed. 2001). Interestingly, however, there is dicta in several cases limiting this principle to instances where only the owner's property interests are at stake. *See, e.g., Smit Americas, Inc. v. M/T Mantinia*, 259 F. Supp. 2d 118, 134 (D.P.R. 2003) (suggesting that an owner's right of refusal is limited in situations involving imminent danger of large losses of the property of *third* persons); *Ramsey v. Pohatcong*, 77 F. 996 (S.D.N.Y. 1896) (holding that tugboat was "bound to respect the master's decision [to refuse salvage assistance]" where case involved only ordinary property interests and "did not involve imminent danger to life, nor the danger of large losses of the property of third persons"); *see also* Martin J. Norris, *The Law of Seaman*, § 9:39 (4th ed. 2002) ("It is the privilege of the master to accept [proffered salvage services] or not, *so long as the vessel in distress is then in a position where nothing but ordinary property interests are involved.*") (emphasis added). In all events, we need not pursue this suggestion further in light of our conclusion that the Coast Guard is not the equivalent of a commercial salvor.

We do not, however, accept that the phrase "any and all" gives the Coast Guard carte blanche authority to engage in forcible evacuations in *less* than life-threatening emergencies. A forcible evacuation from a private vessel constitutes a seizure of the person. Under the circumstances, the body of case law developed under the "emergency aid" exception to the *Fourth Amendment's* warrant requirement both lends support for evacuation authority and cabins it. That exception requires an objectively reasonable belief by safety officers that a true emergency exists and there is an immediate need for assistance or aid. *See, e.g., McCabe v. Life-Line Ambulance Serv.*, Inc. 77 F.3d 540, 545 (1st Cir. 1996) (recognizing that "exigent circumstances" exceptions, by their nature, turn upon the objective reasonableness of ad hoc, fact-specific assessments); *United States v. Richardson*, 208 F.3d 626, 629 (7th Cir. 2000) (explaining that, "as is normally the case for Fourth Amendment inquiries, the test is objective"); *Russoli v. Salisbury Township*, 126 F. Supp. 2d 821, 846-59 (E.D. Penn. 2000) (suggesting without deciding that the emergency aid doctrine might justify a seizure, for the person's own good and the good of others, where safety officers reasonably believe that there is a life-threatening emergency).

In situations as the present, where we are satisfied that such a life-threatening emergency could reasonably be found to exist, *infra* p. 28, the Coast Guard possessed under § 88 the discretionary authority to order (or not order) a forced evacuation. Within the scope of that discretionary authority, we hold that the Coast Guard could not be held liable for the consequences of its decision.

4. The Instant Scenario

The facts of this case lead us to conclude that the Coast Guard reacted rationally, and that human life could reasonably have been deemed to be at serious risk had Captain Haggerty and his crew not been removed. The NORTHERN VOYAGER, without steering, was rolling in six to eight foot ocean seas. Water was pouring in. She was developing an increasing port-side list. The fishing boat's only access port was on the starboard side. The Coast Guardsmen on the vessel reported progressive flooding, raising the possibility that the ship would capsize, trapping all on board. While arguments can perhaps be made in the light of 20-20 hindsight tending to minimize the potential dangers had the master and his fellows been allowed to remain, we see no basis to doubt the objective reasonableness of the Coast Guard's on the scene decision to remove them.

Under the circumstances (and in light of our conclusions above), we hold that (1) the discretionary function exception applies to the decision at issue; (2) the Coast Guard made a policy choice when it determined the time had come, in the interest of safety, to take the men off; (3) the Coast Guard acted within the broad rescue powers specified by Congress in § 88; and (4) the Coast Guard was not guilty of violating rights applicable in more ordinary circumstances (i.e. where the threat to life was less).

C. The Coast Guard's Conduct Vis-a-vis the Private Salvor.

Plaintiffs' alternative argument is that evidence of Coast Guard alleged discouragement or interference with the efforts of Michael Goodridge, the commercial salvor, warrants a remand for a determination of liability. The government has

never advanced any protected policy reasons, and we can think of none, to explain its conduct vis-a-vis the commercial salvor. Rather, to the extent that conscious decisions were made, rather than mistakes, oversights, or misstatements, the decisions appear to be ordinary professional judgments. Accordingly, we turn to the issue of liability.

Plaintiffs suggest that the Coast Guard was negligent in delaying the start of Goodridge's response, instructing Goodridge to stay off the radio, and suppressing effective communication with him. Plaintiffs also suggest that Captain Haggerty detrimentally relied on the Coast Guard's assurance that it was working on getting commercial assistance, and, as a result, did not make independent radio calls of his own for such commercial assistance. Although we are unpersuaded by plaintiffs' arguments based on allegations of delay and reliance, we find sufficient evidence in the record to create a factual issue on the question whether the Coast Guard's interference with the commercial salvor's communications prevented Goodridge from pursuing salvage efforts and using his diving capacity to find and plug the leak. We explain, beginning with the relevant standard of negligence and then applying it to the facts of this case.

1. The Good Samaritan Rules.

The parties agree that the standard of negligence in this context is the Good Samaritan rule "which makes one person liable to another for breach of a duty voluntarily assumed by affirmative conduct, even when that assumption of duty is gratuitous." *Good v. Ohio Edison Co.*, 149 F.3d 413, 420 (6th Cir. 1998) (quoting *Patentas v. United States*, 687 F.2d 707, 713-14 (3d Cir. 1982)). This doctrine is articulated in § 323 of the Second Restatement of Torts which provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323.

A parallel rule in § 324A of the Second Restatement deals with liability to third persons:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324A.

Under these provisions, Coast Guard liability based on negligence may be established provided it can be shown that the Coast Guard's negligence "increase[d] the risk" of harm. Plaintiffs "must show that the Coast Guard through

affirmative actions caused some physical change to the environment or some other material alteration of circumstances." *Good*, 149 F.3d at 421 (citations and internal quotation marks omitted). "Thus, '[t]he test is not whether the risk [was] increased over what it would have been if the defendant had not been negligent,' but rather whether '[t]he risk was increased over what it would have been had the defendant not engaged in the undertaking at all.'" *Id.* (quoting *Myers v. United States*, 17 F.3d 890, 903 (6th Cir. 1994)); *see also Sagan v. United States*, 342 F.3d 493, 498 (6th Cir. 2003) (quoting *Myers*).

Coast Guard liability may also be established in appropriate circumstances on a theory of induced "reasonable, justifiable" detrimental reliance. *Myers*, 17 F.3d at 904. The reliance must have caused another "to forgo other remedies or precautions against the risk." *Id.* at 903 (quoting Restatement § 324A cmt. e). In the maritime context, detrimental reliance has been found where the "Coast Guard's actions caused potential rescuers to rest on their oars . . . in reliance on the Coast Guard's undertaking and its presumed, unless affirmatively disclaimed, competency." *Fondow v. United States*, 112 F. Supp. 2d 119, 130 (D. Mass. 2000) (citations and internal quotation marks omitted).

A related principle, set forth in § 327 of the Second Restatement, is also relevant and has been applied in the maritime context. *See Hood v. United States*, 695 F. Supp. 237, 43-44 (E.D. La. 1988). Section 327 provides:

> One who knows or has reason to know that a third person is giving or is ready to give to another aid necessary to prevent physical harm to him, and negligently prevents or disables the third person from giving such aid, is subject to liability for physical

> harm caused to the other by the absence of the aid which he has prevented the third party from giving.

Restatement (Second) of Torts § 327.

Our decision in *Sandra & Dennis Fishing Corp.* is consistent with the Good Samaritan rule as articulated above. In *Sandra & Dennis Fishing Corp.*, the Coast Guard clearly worsened the position of the towed vessel which, when taken in tow, was in no imminent peril. *See Rodrigue v. United States*, 968 F.2d 1430, 1434-35 (1st Cir. 1992) (observing that, in *Sandra & Dennis Fishing Corp.*, "the district court made the significant finding that there would have no stranding but for the Coast Guard's misconduct"). Additionally, in *Sandra & Dennis Fishing Corp.*, we emphasized that the Coast Guard had induced reliance upon a belief that it "would perform its functions with reasonable care." 372 F.2d at 195; *see also Daley v. United States*, 499 F. Supp. 1005, 1010 n.6 (D. Mass. 1980) (Aldrich, J., sitting by designation) (explaining that this comment in Sandra & Dennis must be understood against a record which showed that the disabled vessel had refrained from seeking other available assistance).

More recently, this Court discussed "the Good Samaritan rule" in a case where parents of an airman who drowned after being carried out to sea by strong currents at a recreational beach sued the Air Force based on its four-hour delay after notification in sending a rescue helicopter. *See Rodrigue*, 968 F.2d at 1434-35. We emphasized that the plaintiffs could not state a case simply by alleging that the Air Force was negligent. *See id.* at 1435. Rather, it was necessary to show, more likely than not, that by its negligence the Air Force had worsened the airman's position. *Id.*

Finally, we note that in evaluating Coast Guard conduct under the Good Samaritan rule, courts must consider the Coast Guard's actions and decisions in light of the information known during the rescue and not with the benefit of hindsight. *See Fondow,* 112 F. Supp. 2d at 131 (citing cases). Accordingly, "conduct that might ordinarily be negligent may be non-negligent in the pressure cooker circumstances of a rescue." *Id.*

2. The Standards Applied.

a. The Reliance Argument.

The evidence of detrimental reliance is insufficient as a matter of law to support a finding of Coast Guard liability, and, thus, by itself would not warrant a remand. In his sworn declaration, Captain Haggerty states that "[b]ecause the Coast Guard had told me that they were working on arranging commercial assistance, I did not make any calls on the radio." However, he does not state exactly what the Coast Guard said or when. *See* Fed. R. Civ. P. 56(e) (requiring affidavits to set forth "specific facts showing that there is a genuine issue for trial").

The only other evidence we have on this point is Haggerty's vague deposition testimony that he "asked Station Gloucester if there was anybody available, if there was any more pumps" and the response was "[w]e're working on that." The Coast Guard's response, without more, falls short of a representation that the Coast Guard was working on obtaining commercial assistance.[12] We do not think that a

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[12] In fact, depending upon when the Coast Guard's statement was made, a natural assumption is that it was talking about the

reasonable jury could find that Haggerty justifiably relied on the Coast Guard's vague response and reasonably refrained from making any efforts of his own to contact commercial assistance.

b. The Delay

Similarly, the evidence tending to suggest that the Coast Guard delayed Goodridge's departure by reason of its initial response discouraging his participation in the rescue operation is insufficient as a matter of law to warrant a remand. Goodridge's initial phone call to the Coast Guard was at 9:03 a.m. He was told they were going "to handle it." But by 9:15 a.m., notwithstanding that response, he was on the telephone to Cape Ann Divers to see who might be available to assist him. In addition, some time during that period, Goodridge took time to load his truck before notifying the Coast Guard at 9:33 a.m. that he was on his way to assist. Viewing the evidence in the light most favorable to plaintiffs, the delay was, at most, twelve minutes. We do not think a reasonable jury could find that this brief delay was material. Plaintiffs' expert opined that Goodridge's boat was in a position to reach the NORTHERN VOYAGER on or about 10:50 a.m. Even if Goodridge had arrived at the vessel roughly twelve minutes earlier than expected, at 10:38 a.m., it would have been after the evacuation. Indeed, by 10:38 a.m. the Coast Guard 47-footer was already en route to Station Gloucester with the Northern Voyager crew on board.[13]

Coast Guard cutter ADAK, which arrived late on the scene with additional pumps.

[13] Our dissenting colleague suggests that, in addition to a twelve-minute delay of Goodridge's departure from Newburyport, the record supports a finding that the Coast Guard caused further

We add, moreover, that we see nothing wrong in the Coast Guard's response at 9:03 a.m. that they were going "to handle it." Captain Haggerty had, in fact, called the Coast Guard; they were planning to go to the NORTHERN VOYAGER's assistance; and at 9:03 a.m. the Coast Guard had yet to be informed as to many of the details that might have indicated a need for Goodridge's additional assistance.

c. Alleged Interference With/Failure to Facilitate Communications Between Goodridge and the NORTHERN VOYAGER.

Plaintiffs have a stronger argument of Coast Guard interference with Goodridge's efforts based on Station Gloucester's misstatement to Goodridge at 10:03 a.m. that it "needed to keep this frequency clear." *See* note 1, *supra*. As noted, one who negligently prevents or disables a third person from giving aid necessary to prevent physical harm is subject to liability for that harm caused by the absence of the prevented aid. *See* Restatement (Second) of Torts § 327,

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delay once Goodridge arrived at his boat at Cape Ann Marina by its indefinite response to his query as to whether additional pumps were needed or just diving assistance. Appellants made no argument along these lines, and we are not persuaded. The transcript of the radio communication indicates the Coast Guard responded reasonably to Goodridge's inquiry by saying "we're not sure at this time." Although the dissent suggests this indefinite response caused Goodridge to spend unnecessary extra time loading pumps on board his boat, we do not see how the Coast Guard can be faulted for its response, especially given record evidence that the Coast Guard's own pumps kept failing and the possibility that, even if diving assistance were successful, some additional pumping assistance might be required.

supra p. 32.[14] Here a fact-finder could determine that the Coast Guard's negative responses to Goodridge, after assuming control itself of the rescue operation, prevented or disabled Goodridge from giving aid that could have prevented the NORTHERN VOYAGER from sinking.

By 10:03 a.m., Coast Guard personnel had been told by the captain that the vessel "might, ah, dropped the rudder." And in his 10:03 a.m. transmission to the Coast Guard, Goodridge indicated both that he was on his way and could offer diving assistance. Diving capability, given the character of the leak -- an open rudder tube allowing a pathway for the sea water to enter the ship -- could be found to have been just what the NORTHERN VOYAGER needed. The record contains expert testimony that such a leak could be contained by a diver's inserting of objects like a life preserver or lobster buoy into the opening. Goodridge testified he had the equipment and skill to have plugged the rudder leak in a matter of minutes. Yet the Coast Guard's only response was to tell Goodridge to clear the air waves.

In his deposition, Goodridge testified that the reason he did not later seek to radio the master of the NORTHERN VOYAGER, after the master had been evacuated to the Coast Guard's 47-footer, was that "he [had] been told twice to stay off the radio." We think there is sufficient evidence for a reasonable fact-finder to find that the Coast Guard's rebuff at

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[14] Although § 327 is arguably, by its terms, limited to physical harm to a person, it applies to claims involving property damage through the operation of Restatement (Second) of Torts § 497 ("The rules which determine negligence of conduct threatening harm to another's interest in the physical condition of land and chattels are the same as those which determine the negligence of conduct which threatens bodily harm.").

10:03 a.m. discouraged Goodridge from further attempts to communicate with the Coast Guard or, directly, with the NORTHERN VOYAGER, as he motored to the scene. Had he done so, plans might have developed that would have led to saving the vessel. In particular, had Goodridge communicated with Captain Haggerty, or even a knowledgeable Coast Guard officer involved in the rescue operation, advance plans could have been discussed for Goodridge to dive under the NORTHERN VOYAGER while it was still afloat.[15]

The Coast Guard's witness, Chief Warrant Officer Dittes, conceded that the information that Goodridge was coming was "a significant piece of information" and the sort "they would normally pass to the person that's in trouble." Yet the Coast Guard did not advise the NORTHERN VOYAGER that Goodridge was on the way, much less did it note the fact that Goodridge had a diving capability which might be put to good use. Had Captain Haggerty been alerted that Goodridge was coming, and had he then communicated by radio with Goodridge, advance plans could have been laid for Goodridge to dive under the NORTHERN VOYAGER and plug the leak. There is evidence from which to infer that even if Goodridge arrived shortly after Haggerty had been removed from his

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[15] In his affidavit, Captain Haggerty stated in pertinent part:

> If Mr. Goodridge had been allowed to call me on the radio or by cellphone, I could have communicated with him and learned what he needed. If this had happened, I could have and would have shut off those engines, rigged a Jacobs ladder, and communicated this to him, even if we were nevertheless to be forced off the vessel thereafter.

Aff. of Captain Haggerty p. 8.

sinking vessel, the dive might have been consummated had Haggerty prepared for it before leaving the NORTHERN VOYAGER. *See* note 15, *supra*.

We do not suggest the Coast Guard had an independent duty of its own to provide a commercial diver.[16] Even if it exercised poor judgment in not doing so, it would not be civilly liable unless its negligence worsened the situation over what it would have been had the Coast Guard not come to the aid of the NORTHERN VOYAGER. But its announcement to Goodridge that it was "handling" the rescue operation and its later insistence when Goodridge called that he keep the frequency clear, coupled with its failure to tell Captain Haggerty about Goodridge, could be found to have discouraged Goodridge from further attempts to communicate and so to assist the NORTHERN VOYAGER. The Coast Guard had a duty not to throw roadblocks in the path of Goodridge's independent efforts to help. A fact-finder might find that by announcing it was handling the rescue, and then that it needed to keep the frequency clear, the Coast Guard in effect declared exclusive control over rescue-related communications, leading Goodridge to forgo further efforts either to call the NORTHERN VOYAGER directly or to

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[16] The current version of the Coast Guard Addendum to the United States National Search and Rescue Supplement provides that "SMC's [i.e., Search and Rescue Mission Coordinator's] must remain familiar with all SAR assistance resources within the SMC's [area of responsibility] . . . and shall direct those resources that the SMC believes are needed to the scene of a vessel in distress." Coast Guard Addendum § 4.2.7.1. Commercial providers are an assistance resource. *Id.* at § 4.2.3.3. However, the National SAR manual and the Addendum do not define a standard of care owing to the public. *See, e.g., In re American Oil Co.*, 417 F.2d 164, 170 (5th Cir. 1969); *Daley*, 499 F. Supp. at 1010.

discuss salvage options with Coast Guard officers handling the rescue.

The Coast Guard's comment about the need to keep the frequency clear came at a critical time when the decision whether to evacuate was under consideration. If Goodridge had not been discouraged from further contact at this time, before the evacuation, there is evidence suggesting the outcome could have been different. Had Captain Haggerty spoken to Goodridge or even been told by the Coast Guard he was on the way with a diver, he could have notified Goodridge that he wished his assistance. By itself, such an expression would likely have caused Goodridge to have increased and prolonged his efforts to reach and assist the sinking vessel. Further, communication could have allowed Goodridge to arrange with Captain Haggerty to dive under the vessel. Even if the Coast Guard still believed that safety considerations required Haggerty to leave the vessel before Goodridge could reach it, the captain stated in his affidavit that he could have taken steps to facilitate a dive before leaving by, for example, making sure to shut off the engines (and to assure Goodridge of the fact), and rigging a Jacobs ladder in order to facilitate a possible return to the vessel. Thus, a fact-finder could determine that even without Haggerty on board, a dive to plug the leak could have been arranged. Indeed, the record supports a possible inference that the first step, alone, would have been sufficient, and that if Goodridge had been engaged by Haggerty and had then simply been assured that the main engines were turned off, he would have been willing to dive under the vessel and seek to plug the rudder tube, thereby checking the influx of water and quite possibly stabilizing the situation so as to permit further salvage efforts that would have ultimately saved the vessel.

A similar argument can be made based on Station Gloucester's unhelpful response to Goodridge on or about 10:47 a.m. when Goodridge contacted the station by radio hoping to get in touch with the captain. At this point, both Goodridge and the captain, who was by then on board the 47-foot Coast Guard vessel, were roughly one mile from the sinking NORTHERN VOYAGER. Station Gloucester first told Goodridge to call back by "land line" and, then, when Goodridge called by cellular phone, told him that he could speak to the captain back at the station. Captain Haggerty was not immediately informed of the call nor were efforts made to allow contact via the radio of the Coast Guard's vessel bearing Haggerty. A fact-finder could reasonably infer that the Coast Guard's response to Goodridge had the effect of interfering with the last opportunity to arrange for a dive. The only way in which Goodridge could have contacted the captain meaningfully once he was aboard the Coast Guard vessel would have been via the latter's radio. At 10:47 a.m., with both Goodridge and the captain not far from the scene, it remained possible that, had they spoken, Goodridge might still have taken effective measures to dive and plug the leak. Or, at least, the record suffices to raise a factual issue on this point.

In sum, we think the evidence, viewed in the light most favorable to appellants, was such that a reasonable fact-finder could conclude that the Coast Guard had reason to know that a third party was ready to give aid of a potentially useful type that the Coast Guard could not provide, and that it negligently engaged in actions that tended to prevent or disable such person from giving such aid. Further, we think that a fact-finder could conclude from such evidence, viewed most favorably, that this negligence was a proximate cause of the sinking of the NORTHERN VOYAGER. Under the circumstances, a remand for further proceedings is warranted.

It is true that under the Good Samaritan rule the appellants have the burden of demonstrating that the Coast Guard increased the risk of the NORTHERN VOYAGER's sinking over what it would have been had there been no Coast Guard involvement at all. Arguably, appellants have not established that, absent the Coast Guard's pumping assistance, the NORTHERN VOYAGER would have stayed afloat for a sufficient time to permit Goodridge to reach it and effectively plug the leak, (i.e., that the loss of the NORTHERN VOYAGER could have been prevented by the private salvor, acting alone, had the Coast Guard not become involved). However, according to plaintiffs' experts, there are various things that Captain Haggerty and his crew could have done to contain the flooding temporarily and stabilize the situation, such as closing certain doors and making them watertight. While there is little or no evidence in the record that the captain and his crew actually did or thought of any of these things at the time of the emergency, there was evidence to suggest that at least one of the doors was not shut because of the presence of the hose of a Coast Guard pump. While the evidence is perhaps minimal that the ship would have survived until Goodridge could have saved it without help from the Coast Guard's pumps, we find it sufficient, viewed in the light most favorable to appellants, to establish a factual issue and warrant a trial on the question of whether the Coast Guard worsened the plight of the NORTHERN VOYAGER by its negative handling of Goodridge's attempts to become involved by radio.

CONCLUSION

For the foregoing reasons, we affirm so much of the district court opinion as concluded that the Coast Guard's decision to forcibly evacuate the crew is protected by the discretionary function exception but remand for further

proceedings on plaintiffs' claim that Coast Guard interference with communications between the commercial salvor and NORTHERN VOYAGER resulted in the sinking of the ship.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

TORRUELLA, Circuit Judge (Concurring in part, Dissenting in part).

I agree with the remand of the plaintiff's claim against the Coast Guard for interference with communications between the commercial salvor and NORTHERN VOYAGER. I respectfully disagree, however, with the majority's reasoning, its holding, and with the scope of the remand.

First, I am decidedly in disagreement with the majority's recognition of authority by the Coast Guard to forcefully remove the master of a vessel[17] from his ship, thus preventing him from continuing efforts to save it. With due respect, there is no authority in law, practice, or maritime tradition that validates such action by the Coast Guard, nor am I aware of the government's having claimed such extraordinary powers before the inception of this case. Because the Coast Guard lacked the authority to remove the NORTHERN VOYAGER's master from his vessel against his will, the discretionary function exception relied upon by the government is inapposite. *See Hatahley v. United States*, 351 U.S. 173, 181, 76 S. Ct. 745, 100 L. Ed. 1065 (1956) (holding that an agent acting outside his delegated authority is not protected by the discretionary function exception); *Red Lake Band of Chippewa Indians v. United States*, 255 U.S.

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[17] And volunteering officers.

App. D.C. 162, 800 F.2d 1187, 1196 (D.C. Cir. 1986) (holding that a "decision cannot be shielded from liability if the decisionmaker is acting without actual authority"); *Birnbaum v. United States*, 588 F.2d 319, 329 (2d Cir. 1978) (holding that "discretionary function can derive only from properly delegated authority").

The new, misguided doctrine promoted by the government in this appeal will have far reaching implications for the maritime and marine insurance industries. At a minimum, it will result in a shift in the decision-making responsibility for the safety and salvage of a ship from the person best qualified and most knowledgeable regarding his vessel, the master, to a governmental agency that, as well intentioned as it may be in its actions, is not even required by law to engage in any rescue attempt. *See infra* I(B)(1). In effect, the Coast Guard is now empowered to arrive at the scene, forcibly remove the ship's captain, and leave the scene of the marine casualty without any duty of engaging in *any* attempt to save the vessel.

Such a momentous shift in policy and such an extraordinary grant of authority should not be undertaken absent a clear legislative mandate expressed both in the text of the statute and in its legislative history. Ordinarily, major policy changes of this nature are the result of an unambiguous Congressional grant, written in plain language, enacted after considerable public hearings and input from the affected public, thus providing the courts with clear guidance in its judicial function. In this case, one looks in vain for such background or guidance. It is nowhere to be found. The government asks this Court to take a leap of faith based on its say, and with a dearth of authority. The very fact that there is no judicial decision, legislative history or prior claims to such powers, notwithstanding the over 39,000 maritime

rescue interventions effectuated every year by the Coast Guard,[18] speaks volumes about the government's claim to the existence of such power. *See General Elec. Co. v. Gilbert*, 429 U.S. 125, 143, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976) (citing *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 858-59, n.25, 95 S. Ct. 2051, 44 L. Ed. 2d 621 (1975); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94, 94 S. Ct. 334, 38 L. Ed. 2d 287 (1973)) (noting that courts have refused to follow administrative guidelines when they conflict with past pronouncements of an agency); *see also Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (requiring an agency to provide reasoned analysis before changing its standards).

The majority's reliance by analogy on state police power legislation[19] is particularly inappropriate considering that the federal government lacks a similar police power. *See Lottery Case*, 188 U.S. 321, 23 S. Ct. 321, 47 L. Ed. 492 (1903) (holding "that there is no such thing as a Federal police power except in respect of those specific subjects delegated to Congress, such as treason, counterfeiting, piracies and felonies on the high seas and offences against the laws of nations"). Although I will discuss this point more fully below, it should be noted that the state statutes cited as authority for forcible removals in land-based emergencies contain specific statutory language or have legislative histories granting such

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[18] U.S. Coast Guard, *2002 Coast Guard Ann. Rep.*

[19] Analogies between state and federal statutes can be a hazardous enterprise. *See, e.g., Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Sante Fe Ry. Co.*, 470 U.S. 451, 470, 105 S. Ct. 1441, 84 L. Ed. 2d 432 (1985) (refusing to transfer, by analogy, the wording of a state statute into a federal statute.)

authority. These state statutes and authorities are particularly inapposite to the quintessential maritime scenario presented by this appeal, one which should be properly guided solely by the uniquely federal admiralty laws, practices and traditions. *See* U.S. Const. art. III, § 2 (specifically extending federal judicial power to "all Cases of admiralty and maritime Jurisdiction"); Fed. R. Civ. P. 9(h), 14(c), 38(e), & 82 (applying a distinct set of rules for admiralty cases); *see generally* Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 3-2 (3d ed. 2001) (explaining the uniqueness of admiralty law).

I. Discretionary immunity only applies if the actor had actual authority

Discretionary immunity protects government decisions from tort liability only when the decision-maker is acting within the scope of his actual authority. *See*, *e.g.*, *Hatahley*, 351 U.S. at 180-81 (holding that the discretionary function does not apply where the decision-maker lacks authority); *K.W. Thompson Tool Co. v. United States*, 836 F.2d 721, 727 n.4 (1st Cir. 1988) (stating that a "decision cannot be shielded from liability if the decisionmaker is acting without actual authority") (internal citation and quotations omitted); *Red Lake Band of Chippewa Indians*, 800 F.2d at 1196-97 (determining that unauthorized actions are not shielded from liability under the discretionary function exception); *Birnbaum*, 588 F.2d at 329-30. The majority correctly presented this aspect of the discretionary function test. However, the majority incorrectly concluded that the Coast Guard had authority to order the evacuation of the NORTHERN VOYAGER.

The issue upon which I most ardently disagree with the majority is whether the Coast Guard, when asked to provide

salvage assistance to a stricken vessel, has authority under 14 U.S.C. § 88, or any other statute, to compel an unwilling master to quit salvage efforts and to evacuate his vessel when Coast Guard personnel determine that further salvage efforts would be futile or dangerous.

A. 14 U.S.C. § 88 does not give the Coast Guard unbridled authority

Whatever the scope of 14 U.S.C. § 88, the statute does not confer unlimited authority upon Coast Guard officials to act in any way they see fit merely because they are engaged in rescue efforts. It is true that the statute's cryptic direction to "perform any and all acts necessary" may sound like a grant of unlimited authority to the Coast Guard.[20] Nevertheless, the language does not empower the Coast

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[20] In pertinent part, 14 U.S.C. § 88 provides:

> (a) In order to render aid to distressed persons, vessels, and aircraft on and under the high seas and on and under the waters over which the United States has jurisdiction and in order to render aid to persons and property imperiled by flood, the Coast Guard may: (1) perform any and all acts necessary to rescue and aid persons and protect and save property; (2) take charge of and protect all property saved from marine or aircraft disasters, or floods, at which the Coast Guard is present, until such property is claimed by persons legally authorized to receive it or until otherwise disposed of in accordance with law or applicable regulations, and care for bodies of those who may have perished in such catastrophes; (3) furnish clothing, food, lodging, medicines, and other necessary supplies and services to persons succored by the Coast Guard.

Guard, in a rescue context, to issue orders without regard to the statute's purpose or the rights of private citizens.

A glance at identical language from analogous *federal* statutes reveals that Congress cannot have intended such "any and all acts" provisions to constitute an independent grant of unbounded authority.[21] In nearly every instance in which Congress has granted an agency authority to "perform any and all acts necessary" to further some legislative goal, it is evident from the context that the provision grants an agency general implementary powers, but is not intended to expand the scope of that agency's powers "beyond those that may fairly be implied from the substantive sections and the functions there defined." *See PSC of New York v. FERC*, 866 F.2d 487, 492 (D.C. Cir. 1989) (citing *Mobil Oil Corp. v.*

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[21] Historically, Congress has only employed the phrase "any and all acts" when furnishing a newly-created administrative agency or program with sufficient flexibility to accomplish its central statutory purposes. *See*, *e.g.*, 16 U.S.C. § 583j-2 (establishing a foundation under the supervision of the Forest Service and authorizing that foundation to perform "any and all acts necessary and proper" to carry out the purposes of the foundation); 16 U.S.C. § 3703 (authorizing the National Fish and Wildlife Foundation to perform "any and all acts necessary and proper"); 20 U.S.C. § 5509 (establishing the National Environmental Education and Training Foundation and authorizing the Foundation to perform "any and all acts necessary and proper"); 43 U.S.C. § 373 (authorizing the Secretary of the Interior to perform "any and all acts" to make rules necessary to implement a program of reclamation and irrigation of lands by the federal government).
I think it self-evident that, despite conferring these agencies with the power to perform "any and all acts" in furtherance of some statutory purpose, Congress did not thereby confer unfettered authority upon agencies such as the Forest Service or National Fish and Wildlife Foundation.

FPC, 157 U.S. App. D.C. 235, 483 F.2d 1238 (D.C. Cir. 1973)).

Not surprisingly, when construing other statutes employing this phrase, this Court has found that the phrase "any and all acts" does not itself grant independent powers, but merely provides for implementation of the core purposes of the statute. For example, when construing analogous language from the Federal Power Act, we concluded:

> While the Federal Power Act contains a "necessary and appropriate" provision, *see* 16 U.S.C. § 825h (granting FERC "power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary and appropriate"), that provision merely augments whatever *existing* powers have been conferred on FERC by Congress, without itself comprising a source of *independent* authority to act.

Boston Edison Co. v. FERC, 856 F.2d 361, 369-70 (1st Cir. 1988) (emphasis in the original) (internal citations omitted); *see also New England Power Co. v. FPC*, 151 U.S. App. D.C. 371, 467 F.2d 425, 430-31 (D.C. Cir. 1972).

The phrase "any and all acts" authorizes the Coast Guard to implement and maintain a capability to conduct search and rescue operations. The phrase does not literally mean that the Coast Guard may perform *any* action that is tangentially rescue-related, without regard to that action's lawfulness, or

proper delegation, or potential impact on the rights of civilian mariners.[22]

The majority recognizes the logic of this argument in part when it notes that the Coast Guard's power under the statute is not unbridled. *Maj. Op.* at II(B)(3). To avoid giving the Coast Guard the unlimited power it claims, yet still give it enough authority to meet the discretionary immunity test, the majority judicially creates a limitation to § 88 out of whole cloth. It holds that Coast Guard authority exists only during life-threatening situations when there is an objectively reasonable belief by safety officers that a true emergency exists and there is an immediate need for assistance or aid. Needless to say, there is no mention of such a limitation in the congressional history or in previous case law regarding § 88, yet the majority depends on this limitation to uphold the proposition that the Coast Guard had actual authority.

The problem with judicial legislation is that it often conflicts with the wording and intent of the statute. Such is the present case. The majority's creation conflicts with the very purpose of the discretionary function exception. The "basis of the discretionary function exception was Congress' desire to prevent judicial second guessing." *Berkovitz v. United States*, 486 U.S. 531, 536-37, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988) (internal citation and quotations omitted). Once a court determines that an agency's decision was discretionary, it is not thereafter free to determine whether the

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[22] To indulge in hypotheticals: while the statute would undoubtedly authorize the Coast Guard to spend money and to use labor conducting a rescue, it plainly would not authorize the Coast Guard to shoot an obstreperous mariner who refused to comply with the suggestions of Coast Guardsmen providing rescue assistance.

decision-maker properly perceived the emergency to be life-threatening and whether such a perception was objectively reasonable. An agency's discretionary decisions are immune "whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). Therefore, once a decision is deemed to be the kind of decision the exception was designed to shield, this Court's inquiry must come to an end. As the Supreme Court concluded, "where the government is performing a discretionary function, the fact that the discretion is exercised in a negligent manner does not make [the exception] inapplicable." *Attallah v. United States*, 955 F.2d 776, 784 n.13 (1st Cir. 1992) (citing *Dalehite v. United States*, 346 U.S. 15, 33, 73 S. Ct. 956, 97 L. Ed. 1427 (1952); *Berkovitz*, 486 U.S. at 539)) (further citations omitted). Likewise, where the Coast Guard is performing a discretionary function, the fact that the decision-maker wrongly perceived the situation to be life-threatening will not make the exception inapplicable.

The better and, in my belief, the only correct interpretation of § 88 is one that does not require judicial legislation. Like statutes with similar language, § 88 grants the Coast Guard general implementary powers. It does not grant the Coast Guard the authority to threaten an unwilling master to evacuate his vessel if Coast Guard personnel determine that further salvage efforts would be dangerous.

I am unaware of any case or authority, nor does the majority cite to any, conferring such sweeping authority upon the Coast Guard in the search and rescue context, other than the statute in question.[23] Keeping these general limitations in

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[23] The majority also cites Coast Guard Manuals to support the proposition that the Coast Guard has actual authority during search

mind, we turn to the substantive language and purpose of § 88 to determine whether the Coast Guard's evacuation order was within the permissible range of actions authorized by the statute.

B. Scope of authority

The Coast Guard is the historical product of five federal agencies.[24] In 1915 "the U.S. Revenue Cutter Service and the

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and rescue operations to forcefully remove a ship's crew. First, I do not read any language in that Manual indicating that the Coast Guard has the authority to force a master off his vessel. Second, Coast Guard manuals do no more than serve as a "training and operational tool" for search and rescue operations. U.S. Coast Guard, *National Search and Rescue Manual* (1991). They are nothing more than "reference documents" to aid the Coast Guard and other rescue groups outside the Coast Guard. *See* U.S. Coast Guard, *Coast Guard Addendum to the National Search and Rescue Manual*. By no means can a manual create authority for the Coast Guard when no such power has been authorized by Congress. *See also Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000) (reiterating that statutory "interpretations contained in . . . agency manuals" do not warrant deference.) Third, the United States National Search and Rescue Supplement recognized that Coast Guard negligence "may, in some circumstances, create legal liability" if an "attempted rescue . . . is conducted so that it . . . worsens the situation of . . . one in distress." National Search and Rescue Committee, *United States National Search and Rescue Supplement to the International Aeronautical and Maritime Search and Rescue Manual* (May 2000).

[24] The agencies that merged into the Coast Guard are: the United States Lighthouse Service (1 Stat. L. 53) (1789); the Revenue Cutter Service (12 Stat. L., 639) (1863); the Steamboat Inspection Service (10 Stat. L., 1852) (1852); the U.S. Life-Saving

U.S. Lifesaving Service were merged to form a new agency, the U.S. Coast Guard." D.C. Baldinelli, *The U.S. Coast Guard's Assignment to the Department of Homeland Security: Entering Uncharted Waters or Just a Course Correction*? (Dec. 9, 2002), available at http://www.uscg.mil/hq/g-cp/history/Homeland_Security_Baldinelli. html. In the 1930s and 1940s the Coast Guard absorbed the U.S. Lighthouse Service, the Steamboat Inspection Service and the Bureau of Navigation. *Id*. In 1967, the Coast Guard was transferred from the Treasury Department to the Department of Transportation. *Id*. In 2003, the Coast Guard was transferred to the Department of Homeland Security. *See* 6 U.S.C.S. § 101 (2003).

It thus appears that the Coast Guard, or its predecessors, has been with us since the inception of the Republic. Yet, in all of its various forms there is not a single reported case, not a shred of documented evidence, not an iota of coherent legislative history, sanctioning the exercise of the extraordinary executive powers claimed by the Coast Guard in this case.

The earliest Congressional statutes authorizing a government agency to perform search and water rescues provided that rescuers could only aid distressed sailors. *See* Act of Dec. 22, 1837, ch. 1, 5 Stat. 208 (1837) (cited in *The Huntsville*, 12 F.Cas. 996, F. Cas. No. 6916 (E.D.S.C. 1860) (No. 6916) (Congress authorized the President "to cause . . . public vessels . . . to cruise upon the coast, in the severe portion of the season . . . to afford such aid to distressed navigators as their circumstance and necessities may require;

Service (20 Stat. L., 163) (1878); and the Bureau of Navigation (23 Stat., L. 118) (1884).

and such public vessels shall go to sea prepared fully to render such assistance")). The authority granted by this original statute was only to "aid" navigators as "their" necessities required. *See id.* Other Congressional legislation similarly established Coast Guard stations and provided Coast Guard funding for the purpose of "assisting vessels . . . from the perils of the sea." Act of Apr. 19, 1906, ch. 1640, 34 Stat. 123; *see also* Act of Aug. 29, 1916, ch. 417, 39 Stat. 601 (providing funding for cutters to be used for "rendering aid to vessels in distress"); Act of June 24, 1914, ch. 124, 38 Stat. 387 (providing funding for two cutters to provide medical aid to vessels engaged in the deep-sea fisheries); Act of May 12, 1906, ch. 2454, 34 Stat. 190 (providing funding for a steam vessel to provide service at sea).

Similar to previous statutes granting a governmental agency the power to "aid" distressed sailors, under § 88, Congress granted the Coast Guard broad powers to "render aid," "rescue and aid" and "furnish clothing, food, lodging, medicines, and other necessary supplies" to distressed persons and vessels. 14 U.S.C. § 88 (a)(3). Neither the history of § 88 nor case law interpreting § 88 support the proposition that the Coast Guard has the authority to force a master to evacuate his vessel.

Cases involving § 88 focus exclusively on two issues. First, courts uniformly hold that the Coast Guard is legally indistinguishable from private mariners regarding its duty to rescue.[25] *See, e.g., In re American Oil Co.*, 417 F.2d 164,

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[25] The majority disagrees and contends that, in circumstances such as the present, Coast Guard operations are relevantly different from the situation in which a private vessel comes to the rescue of a distressed vessel. Maj. Op. at II(B)(3). Once again, the majority

168 (5th Cir. 1969). Second, reviewing courts have concluded that the Coast Guard becomes liable for an attempted rescue when its actions fail to comply with standards of ordinary care and acceptable seamanship. *United States v. Sandra & Dennis Fishing Corp.*, 372 F.2d 189, 195 (1st Cir. 1967).

1. Duty to rescue

The Coast Guard does not have a duty to provide aid or rescue services to distressed persons or vessels. *See Sagan v. United States*, 342 F.3d 493, 498 (6th Cir. 2003) (finding that "[t]he United States Coast Guard does not have an affirmative duty to rescue persons in distress"); *Sandra & Dennis Fishing*, 372 F.2d at 195 (finding that the Coast Guard is under no obligation to "provide rescue service on demand"). So while § 88 empowers the Coast Guard to maintain rescue facilities and carry out rescue efforts, the Coast Guard is legally indistinguishable from a private salvor when it comes to providing rescue assistance. Accordingly,

> [t]he Coast Guard, like a private salvor, renders voluntary assistance where no duty to help is owed the person or vessel in distress. True, it is a statutory function of the Coast Guard to establish and operate rescue facilities. Congress has also provided that the "Coast Guard may render aid to persons and protect and save property at any time and at any place at which Coast Guard facilities and personnel are available and can be effectively utilized." 14 U.S.C. § 88(b). But this legislation falls short of creating a

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makes such an assertion without any supporting citations or referenced authority.

> governmental duty of affirmative action owed to a person or vessel in distress.

In re American Oil, 417 F.2d at 168 (quoting *Frank v. United States*, 250 F.2d 178, 180 (3d Cir. 1957)) (internal citation omitted). Thus while § 88 authorizes the Coast Guard to conduct rescues, it does not impose any affirmative duty to do so.

2. Acceptable seamanship standard

Once the Coast Guard engages in aid or rescue efforts, the United States, like its private counterparts, will be liable only where there is a failure to carry out the rescue mission or aid in accordance with standards of "acceptable seamanship." *Sandra & Dennis Fishing*, 372 F.2d at 197. That means that "[w]hatever may be the limits of this principle with respect to volunteered salvage, we believe that if the Coast Guard accepts a mission it should conduct its share of the proceeding with acceptable seamanship." *Id.* (internal citation omitted).

Thus, once the Coast Guard begins providing rescue assistance to a distressed vessel or persons, its authority under § 88 is bounded by the duty of "acceptable seamanship" it owes to the vessel owner or distressed persons. Whatever else may be said about the limits of the statute, § 88 cannot be construed in a manner which would vitiate the Coast Guard's duty of "acceptable seamanship" when carrying out volunteer salvage services to distressed vessels or persons.

Therefore we are presented with the relatively straightforward question of whether the Coast Guard's forced evacuation order was consistent with principles of "acceptable seamanship." I conclude it was not. Had a private salvor coercively compelled the master and crew to quit salvage

efforts and abandon the NORTHERN VOYAGER, there is no question but that the case would have proceeded to trial to determine whether the salvor's actions affirmatively worsened the condition of the vessel. Here, the Coast Guard, acting in its capacity as a private salvor, violated numerous principles of "acceptable seamanship" by compelling the master to abandon the NORTHERN VOYAGER and wrongfully depriving him of the opportunity to halt further flooding of the vessel and await commercial salvage assistance.

3. Right to refuse unwanted salvage assistance

Though there are no cases directly on point as to whether an order such as the one issued by the Coast Guard is within the bounds of "acceptable seamanship,"[26] the law of salvage provides valuable guidance on this issue. Salvage law governs the rescue and salvage of vessels in marine peril.

One well-established principle is that shipowners and masters have a right to refuse salvage assistance. The right to refuse salvage is a firmly established right of vessel owners and masters: "[u]nder nearly all supposable circumstances when the master is in command and control of his own ship he may refuse and reject salvage services, and no volunteer salvor can force on him, and be rewarded for, services which he forbids." *The Indian*, 159 F. 20, 25 (5th Cir. 1908). This Court has previously acknowledged the master's right to refuse unwanted assistance. In *Hamburg- American Line v. United States*, we noted that "salvage services may not be forced on the unwilling." 168 F.2d 47, 56 (1st Cir. 1948). This view is consistent with the Supreme Court's statement

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[26] For good reason, as the Coast Guard lacks the authority to issue such an order.

that "salvage cannot be exacted for assistance forced upon a ship." *Merritt & Chapman Derrick & Wrecking Co. v. United States*, 274 U.S. 611, 613, 47 S. Ct. 663, 71 L. Ed. 1232 (1927). Other cases strongly support this interpretation of salvage law as well.[27] *See New Harbor Protection Co. v. Steamer Charles P. Chouteau*, 5 F. 463, 464 (D. La. 1881) (holding that a master has "a perfect right to decline any assistance that may be offered him: he should not be assisted against his will").

The majority claims that dicta in two district court cases limits the right to decline salvage assistance to instances where only the owner's property interests are at stake. First, it is important to remember that the majority is relying on mere dicta. Second, this dicta is of dubious value because the rule espoused is contrary to the well-established law of salvage. Third, the dicta cited by the majority limits the right to

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[27] Leading admiralty treatises also recognize that masters can reject salvage assistance. According to Martin J. Norris, "when the master is in command and control of his own ship he may refuse and reject salvage services. A would-be salvor, under such circumstances, cannot force his services on the distressed vessel." Martin J. Norris, *The Law of Seamen* § 9:39 (4th ed. 2002). Additionally, even where a salvor's services have been accepted and assistance rendered, "the salvor must cease his services when requested to by the salved ship . . . . During the time that assistance is being rendered, the officers of the distressed vessel are at liberty to determine when the assistance rendered should be terminated." *Id.* Thomas J. Schoenbaum echoes this view: "Salvage cannot be forced upon an owner or his agent in possession of the vessel; a salvor who acts without the express or implied consent of the owner is a 'gratuitous intermeddler,' who is not entitled to any salvage award." Thomas J. Schoenbaum, 2 *Admiralty and Maritime Law* § 16-1 (3d ed. 2001).

decline salvage assistance from a private salvor to instances when there is danger of large losses of property to *third* persons or when the master's decision to decline salvage assistance was "so palpably and so grossly wrong as to amount to positive misconduct in reference to the claims of humanity." *Ramsey v. Pohatcong,* 77 F. 996 (S.D.N.Y. 1896); *Smit Americas, Inc. v. M/T Mantinia,* 259 F. Supp. 2d 118, 134 (D.P.R. 2003). The NORTHERN VOYAGER did not pose a threat to the property of third persons. Captain Haggerty's decision to continue efforts to salvage his ship was also not so "palpably and grossly wrong," evidenced by the fact that the ship remained upright for fifty-five minutes after he was forced to evacuate the NORTHERN VOYAGER, and afloat for some time after capsizing, all of which was more than enough time to have saved his ship, particularly if the Coast Guard had not interfered with the salvor. The Coast Guard has never claimed that there was any regulatory, military, or law enforcement basis for compelling the NORTHERN VOYAGER's crew to evacuate their vessel. All of the officers who remained aboard the NORTHERN VOYAGER freely volunteered to do so, and there is no indication that any of them were acting in a deranged or reckless manner.

The language of § 88, as well as the long line of cases holding that the Coast Guard is legally indistinguishable from a private party when providing voluntary salvage assistance, compel the conclusion that the Coast Guard lacked authority and acted outside the bounds of "acceptable seamanship" forcing the crew to abandon the NORTHERN VOYAGER.[28]

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[28] It is important to note that we are only concerned with the scope of authority of the Coast Guard under § 88 to assist distressed persons, vessels, and aircraft on and under United States waters.

4. The Coast Guard is unlike state public safety officials

The lack of federal case law or legislative history granting the Coast Guard authority to force a captain from his vessel has led the majority to analogize the actions of the Coast Guard to actions of state public officials during times of emergencies on land. The majority concluded that it is "reasonable to *assume*" (emphasis added) that Congress intended to confer powers to the Coast Guard "analogous to those possessed by state safety officials, namely, the power to rescue a person even against his will in life-threatening situations." *Maj. Op.* at II(B)(3). I find such an assumption totally unwarranted and, like other parts of the majority opinion, unsupported by any authority.

First, there is nothing in the text of § 88 or its legislative history to support such an assertion, and furthermore, the assumption that Congress intended to confer such extraordinary powers by analogy or by implication is in itself a dubious proposition. *See, e.g., Nat'l R.R. Passenger Corp.*, 470 U.S. at 470 (refusing to transfer, by analogy, the wording of a state statute into a federal statute because "neither the language of the [federal] statute nor the circumstances surrounding its passage" supported such an analogy).

Nothing in the majority opinion or in this dissent should be construed to apply to the Coast Guard in its military, law enforcement or regulatory capacities. Moreover, the right of the Coast Guard to evacuate its own personnel from a distressed vessel is not at issue here; had the Coast Guard simply withdrawn its personnel from the NORTHERN VOYAGER, without ordering the NORTHERN VOYAGER's master and officers to evacuate as well, the appellant would have had no cause of action against the United States.

Second, in those cases where courts have found that state safety officials were specifically granted the power to force people from their homes during life-threatening emergencies, that power had been authorized by specific legislative enactment. *See, e.g.*, Alaska Stat. § 18.70.075(a)(2) (granting the fire department "authority to . . . order a person to leave a building"); *see also* Conn. Gen. Stat. § 7-313b; Del. Code Ann. tit. 16, § 6701A(2); N.H. Rev. Stat. Ann. § 154:7; Tenn. Code Ann. § 6-21-703; W. Va. Code § 29-3A-1. In contrast, there is no federal statute remotely similar to these state statutes specifically granting the Coast Guard authority to order a ship's master to abandon his vessel. Moreover, unlike state governments, the federal government does not have a general police power -- something that is probably beyond the authority of any branch of the federal government to create extra-constitutionally. *See Lottery Case,* 188 U.S. 321, 23 S. Ct. 321, 47 L. Ed. 492 (1903).

Third, life-threatening emergencies on land are very different from life-threatening emergencies at sea. Many state statutes grant the state governor or local authorities the power to declare an emergency which would result in a forced evacuation. *See, e.g.*, Alaska Stat. 26.23.020; Fla. Stat. Ann. § 252.38; Me. Rev. Stat. Ann. tit. 37-B, § 742; Minn. Stat. Ann. § 12.21; Or. Rev. Stat. §§ 401.305, 401.309; Tenn. Code Ann. § 58-2-118. On land, it may be presumed that a trained law enforcement official has more knowledge than an average person about an impending emergency, such as a storm or a fire. At sea, however, a captain's expertise regarding his ship places him in the best position to determine the actual peril of his vessel and how best to save it. Coast Guardsmen, unfamiliar with the vessel involved in the emergency, ought not be able to substitute their judgment for that of the master by forcing evacuation upon him. In an

emergency situation, it is unwise for the least knowledgeable to command the most knowledgeable.

Fourth, allowing the Coast Guard to dictate to the master how to save his ship interferes with the vital relationship between a master and his vessel. As one expert on the duties of a master has testified, a master "has no umbilical cord of support. He is the sole decision maker and he lives with the responsibility that he's got to discharge, under adverse and varied conditions, calling upon those levels of expertise at moments and when he's least expecting it." *In re Exxon Valdez*, 1995 U.S. Dist. LEXIS 7401, 1995 WL 527990, at *5 (D. Alaska, Jan. 27, 1995). The exigencies and realities of life at sea require that there be a rigid chain of command aboard a ship. A master's responsibility to his ship is nondelegable and should be free from officious meddling. Particularly in times of life- threatening emergencies, it is unwise to interfere with the chain of command by forcing the master to succumb to the orders and directions of an intervening governmental bureaucracy, particularly one which ultimately disclaims responsibility for its actions.

II. Coast Guard interference with the commercial salvor

I agree with the majority that there is sufficient evidence in the record to create a factual issue on the question of whether the Coast Guard's interference with the commercial salvor's communications prevented him from pursuing salvage efforts and using his diving capacity to find and plug the leak. I disagree, however, with the majority's determination that the district court correctly granted summary judgment because plaintiffs failed to establish a factual issue as to whether the Coast Guard was negligent in delaying Goodridge, the commercial salvor, and as to whether the Coast Guard was

negligent in assuring Captain Haggerty that it was working on getting outside commercial salvage assistance.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Rosenberg v. City of Everett*, 328 F.3d 12, 17 (1st Cir. 2003) (citing Fed. R. Civ. P. 56(c)). We review an award of summary judgment de novo, construing the record in the light most favorable to the plaintiffs and resolving all reasonable inferences in their favor. *Id.*

A. The reliance argument

The parties agree that the Good Samaritan doctrine, "which makes one person liable to another for breach of a duty voluntarily assumed by affirmative conduct," applies to this case. *Good v. Ohio Edison Co.*, 149 F.3d 413, 420 (6th Cir. 1998) (internal citations and quotations omitted). Coast Guard liability may be established if the Coast Guard's statements "mislead . . . [or] induce reliance upon a belief that it is providing something which, in fact, it is not providing." *Sandra & Dennis Fishing Corp.*, 372 F.2d at 195.

There are several statements in the record that create a factual issue as to whether the Coast Guard falsely informed Captain Haggerty that they were arranging for commercial assistance when, it is alleged, they were not. Captain Haggerty testified, in a sworn affidavit, that "[b]ecause the Coast Guard had told me that they were working on arranging commercial assistance, I did not make any calls on the radio . . . to call for help." Haggerty also radioed Station Gloucester asking "if there was anybody available, if there was any more pumps." The Coast Guard responded that they

were "working on that." Haggerty allegedly relied on the Coast Guard's statements and believed them. In fact, it is claimed that even as he was being forced off the NORTHERN VOYAGER, Haggerty reiterated to the Coast Guardsman that he wanted to remain aboard his vessel, to stabilize it and await salvage assistance.

It is admitted that the Coast Guard never arranged for commercial salvage assistance.[29] Nor did they inquire whether anyone was available or whether there were any more pumps.

The majority discounts Haggerty's sworn testimony by concluding that the "natural assumption" is that the Coast Guard's statement that we are "working on that" referred to the impending arrival of the cutter ADAK. It is equally, if not a more "natural assumption," that Haggerty's question asking if anyone was available referred to the availability of commercial salvors, who routinely carry pumps aboard their ships. Most important, this Court must view all facts in favor of the nonmoving party. Any "natural assumptions," therefore, must be viewed in a light most favorable to the plaintiffs. Keeping this in mind, it is clear that there is enough evidence of detrimental reliance to warrant a remand on that issue as well.

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[29] Congress has expressed concerns that the Coast Guard -- acting as a private salvor -- may unduly interfere with commercial salvage efforts. Such concerns led Congress, in 1982 legislation, to direct the Coast Guard to "review Coast Guard policies and procedures for towing and salvage of disabled vessels in order to further minimize the possibility of Coast Guard competition or interference with private towing activities or other commercial enterprise." Coast Guard Authorization Act of 1982, Pub. L. No. 97-322 § 113, 96 Stat. 1581 (1982).

B. The delay argument

By dissecting the record, the majority drew two conclusions: first, the Coast Guard delayed Goodridge by, at most, twelve minutes; and second, twelve minutes is not a significant delay. Both conclusions are wrong.

At 9:03 a.m., Goodridge called Station Gloucester to inform them that he had equipment and was available to assist in the salvage efforts. The Coast Guard responded that "they were busy and they were going to handle it . . . they didn't need any help." After being rebuffed by the Coast Guard, Goodridge returned to work and gathered his gear to prepare to salvage a boat that had sunk that morning. Goodridge continued to listen to his radio transmitting the communications regarding the NORTHERN VOYAGER. After further listening, Goodridge concluded that, despite what the Coast Guard had said, the NORTHERN VOYAGER would need his help. Thus, at 9:15 a.m., Goodridge called Cape Ann Divers to inquire who would be there to assist in a dive and to gather information. At 9:33 a.m. Goodridge called Station Gloucester again and informed them that he was coming with equipment. At this point, the majority is correct that, at most, the Coast Guard delayed Goodridge by twelve minutes. But, the Coast Guard caused further delay once Goodridge arrived at his boat. Using the radio onboard his boat, Goodridge attempted to contact the Coast Guard to ask if "we should take the time to load pumps or just come with the dive gear." The Coast Guard responded: "don't tie up the channel; we're busy; don't tie up the channel."[30] Since the

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[30] Goodridge originally radioed the Coast Guard on channel 16 and, as is customary, told the Coast Guard to switch to Channel 22, the channel where the NORTHERN VOYAGER communications

Coast Guard did not respond, Goodridge "took the time" to "run the pumps down the dock." It is unclear how much extra time this took, but viewing the evidence in a light most favorable to the plaintiffs, it is enough evidence to require a remand on this issue. This is especially true considering that the repairs required by the NORTHERN VOYAGER would have taken "two minutes or less" to complete[31] and did not even require the use of additional pumps.

Further, even if it is assumed that Goodridge was delayed by only twelve minutes, viewing the evidence in a light most favorable to the plaintiff, it can be concluded that the delay was significant.[32] Had the delay not occurred, Goodridge could have arrived at the scene in time to communicate with Captain Haggerty. At such time, further efforts could have been taken to save the NORTHERN VOYAGER. This issue should also be remanded since the delay could have led to the demise of the NORTHERN VOYAGER.

III. Conclusion

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were taking place. After switching to Channel 22, the Coast Guard asked Goodridge to switch to Channel 12. Upon doing so, Goodridge was told not to "tie up" this non-emergency channel, despite the fact that Channel 12 did not contain any emergency communications between the Coast Guard and the NORTHERN VOYAGER. Thus, in effect, the Coast Guard silenced and isolated Goodridge's salvage attempts.

[31] The evidence showed that all a diver had to do was plug the rudder shaft, a simple and quick maneuver.

[32] This evidence should also be viewed in light of the fact that the NORTHERN VOYAGER was afloat for about one hour after the master was forced to abandon it and to cease efforts to save it.

Most respectfully, I strongly disagree with the majority's holding that the Coast Guard has the power to remove a master of a vessel from his ship by threat of force, thereby preventing him from saving it. My views are not some romantic or archaic notion to the effect that the "captain should go down with the ship,"[33] or a claim based on John Stuart Mill-like theories of personal liberty and autonomy,[34] although some might find such arguments appealing. Rather, they are based on the hard realities of the law of the sea as it has existed from time immemorial until this case ensued. The majority's unprecedented holding is not supported by law, practice or maritime tradition. It contradicts legislative enactments and the very purpose of the discretionary function exception. Congress has never granted the Coast Guard the authority to force a master to abandon his vessel. Neither should this Court.

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[33] Although such a tradition, which has not been altogether fanciful at different times, has served to establish a benchmark for the commitment expected of a ship's captain toward his ship, crew and passengers.

[34] *See* John Stuart Mill, *On Liberty* 14 (John Gray ed., Oxford Univ. Press 1991) (1859) ("[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection [of society] ... His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so ... Over himself, over his body and mind, the individual is sovereign.")

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 99-12243-RWZ

[Filed April 17, 2002]

NORTHERN VOYAGER LIMITED PARTNERSHIP, and Commercial Union Insurance Company	)
v.	)
THAMES SHIPYARD AND REPAIR COMPANY, and the United States of America	)

MEMORANDUM OF DECISION

ZOBEL, District Judge.

On the morning of November 2, 1997, while approximately two miles off the coast of Gloucester, Massachusetts, the F/V NORTHERN VOYAGER (the "VOYAGER"), a 144 foot fishing boat, began experiencing steering difficulty. Although the weather was clear at the time, a passing storm had left behind swells of approximately seven to eight feet in height. The boat's chief engineer, Gary

Tibbo ("Tibbo"), was in the wheelhouse with the boat's mate, Peter Flaherty ("Flaherty"). Flaherty began to notice that the boat was starting to make circles in the water, despite the fact that it was set on automatic pilot for a straight course. He asked Tibbo to check the steering gear.

The interior steering gear is located in a space hole called the lazerette. The lazerette is designed to be isolated from the rest of the vessel so that if a rudder is lost or damaged, the resultant flooding can be contained, rather than endanger the entire boat. There are two manholes by which one may gain access to the lazerette, each equipped with watertight covers. If these covers are closed, the lazerette becomes watertight and can flood without affecting the stability of the vessel. The VOYAGER had an electrical pump in the lazerette to counter the unusually high leakage from the rudder. Both manholes to the lazerette had been kept open for easy access to check the pump. When Tibbo entered the lazerette, he found that it was flooded and water was welling up through the starboard manhole. The pressure from the flooding prevented him from closing the manhole cover. He then started to suction out the water with a bilge pump and informed the other crew members of the problem.

Tibbo told the Captain about the flooding, which by that point had entered the machinery space. At Tibbo's suggestion, the Captain called the Coast Guard to report his position and condition and request pumping assistance. During the radio exchange, the Captain voiced his concern about the possibility that water would flood the engine room. If the engine room flooded, all of the boat's electrical pumps and generators located therein would be rendered useless.

The Coast Guard Response

Coast Guard Station Gloucester ("Station Gloucester") responded to VOYAGER's call for assistance, and immediately launched its 41 foot boat into the seven to eight foot swells. Shortly thereafter, the Coast Guard's 47 foot boat began to follow the 41 footer to the scene. At about the same time, Coast Guard Group Boston ("Group Boston"), which had also heard the call for assistance, issued an Urgent Marine Information Broadcast ("UMIB"), to alert all listeners to the VOYAGER's situation. Group Boston then assumed the duties of Search and Rescue ("SAR") Mission Coordinator and began to monitor the case. It also diverted a 110 foot Coast Guard Cutter to assist as the On Scene Coordinator ("OSC").

The Rescue

At 9:13 a.m., the Coast Guard's 41 foot boat arrived at the VOYAGER and evacuated eight crew members. The Coast Guardsmen then began boarding the fishing boat with additional pumps. With the crew's guidance, they tried to dewater the vessel. Coast Guardsman Sean Connors told VOYAGER's Master, David Haggerty, that they would try to keep up with the flooding, but that their main objective was to ensure the safety of the VOYAGER crew members who were still on board. As the flooding continued, the VOYAGER began to develop a port side tilt. This made both access to and escape from the boat more difficult. By the time the decision was made to fully evacuate the boat, the crew had to jump down several feet from the right side of the VOYAGER to the Coast Guard's 47 footer. When the OSC arrived, the Commanding Officer decided to defer to the judgment of those who had already been on scene from the start. Although he expressed discomfort with the Coast Guardsmen

remaining on the sinking vessel, he agreed that they could assist as long as it was safe for them to do so. The condition continued to worsen and Coast Guard Officer Dittes ("Dittes") began to question VOYAGER crew members about the boat's construction. Based on the information gleaned from one of the crew members and on the continual progression of the flooding, Dittes became concerned that the boat would capsize at any moment. The decision to evacuate was met with opposition from VOYAGER's Captain, who insisted that other options for salvage were available. Specifically, he requested to stay on the scene to await the arrival of a commercial salvor who had responded to the initial UMIB. Despite the Captain's request, Dittes ordered the evacuation of all remaining Coast Guard personnel and crew members from the VOYAGER. Fifty minutes later the vessel capsized and sank to the bottom of the ocean where it remains today.

Plaintiffs brought suit against the United States Coast Guard and the Thames Shipyard Repair Company (the "Shipyard"). They allege that the United States is subject to liability under the Suits in Admiralty Act ("SAA"), 46 U.S.C.App. §§ 741-52, for its negligent interference with the VOYAGER salvage efforts. In addition, the Complaint sets forth a laundry list of intentional torts that includes trespass to chattels, conversion, breach of fiduciary obligations, and intentional interference with contractual relations. Defendant United States moves for summary judgment based on theories of comparative negligence, the discretionary function exception, and the Good Samaritan doctrine. Although both sides vigorously dispute the cause of the flooding, the timing of the evacuation, and the impact of the Coast Guard's decisions on the VOYAGER's fate that day, these disputed facts are wholly immaterial in light of the clearly applicable discretionary function exception.

The Suits in Admiralty Act

The SAA acts as a waiver of United States sovereign immunity for certain maritime claims against it. *Gercey v. United States,* 540 F.2d 536, 539 (1st Cir.1976). Unlike the Federal Torts Claim Act ("FTCA"), 28 U.S.C. § 2680(a), the SAA does not contain an express exception for harm caused by the government in the exercise of its discretionary function. The First Circuit, however, has held that "sound principles demand that the [SAA] be construed as subject to such discretionary function exception." *Gercey,* 540 F.2d at 539. The *Gercey* court reasoned:

> Were there no such immunity for basic policy making decisions, all administrative and legislative decisions concerning the public interest would be subject to independent judicial review in the not unlikely event that the implementation of these policy judgments were to cause private injuries. That, in our view, would be an intolerable state of affairs, and we decline, in the absence of an express Congressional directive to the contrary, to construe this waiver of sovereign immunity as providing federal courts with that power.

Id. (internal citations omitted); *see also Canadian Transport Co. v. United States,* 663 F.2d 1081 (D.C.Cir.1980)(application of discretionary function exception is necessary in suits under the SAA to maintain a separation of powers between the legislative and judicial branches). Due to a dearth of opinions on the discretionary function under the SAA, the parties and this Court must extrapolate from the well-developed case law on the exception in the context of the FTCA.

The Discretionary Function Exception

Like the SAA, the FTCA states that "the United States shall be liable ... in the same manner and to the same extent as a private individual under like circumstances ...." 28 U.S.C. § 2674 (1994). One exception to this broad liability is the discretionary function exception, which reserves the United States' immunity regarding any act based upon a government employee's exercise of discretion. *See* 28 U.S.C. § 2680(a). The exception shields any government act "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, *whether or not the discretion involved be abused.*" *Id.* (emphasis added). As a result, the exception prevents courts from making even the most basic of inquiries into the reasonableness of the government's safety or public policy choices, as they would with a private individual under the same circumstances. *See United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984)(certification of aircraft that did not comply with fire protection regulations); *Dalehite v. United States,* 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953)(exposure of Allied Armed Forces to disastrous effects of ammonium nitrate fertilizer explosion); *Ayer v. United States,* 902 F.2d 1038 (1st Cir.1990)(failure to install handrails and other safety measures for tourists at Air Force Base); *Shuman v. United States,* 765 F.2d 283 (1st Cir.1985) (failure to warn against hazardous working conditions); *Gercey,* 540 F.2d 536 (Coast Guard failure to protect public from vessels decertified as unsafe). Congress intended to shield the policy decisions of the legislature from second-guessing by the judicial branch. *Berkovitz v. United States,* 486 U.S. 531, 536-37, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988). Not only do such lawsuits potentially deter the

necessary exercise of government discretion, but they also pose a danger to the separation of the judicial and political branches. *Bruneau v. United States,* 150 F.Supp.2d 303, 308 (D.Mass.2001).

Plaintiffs' reliance on *Indian Towing, Co. v. United States,* 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), for the proposition that the discretionary function exception does not apply in the instant case, is misplaced. The Supreme Court, in *Indian Towing,* addressed the issue of whether the Coast Guard should be held liable for the loss of a ship, due to the Coast Guard's failure to maintain a lighthouse in working order. *Id.* Although the Court held the Coast Guard liable for negligently maintaining, inspecting and repairing the light, it specifically stated that the discretionary function was not an issue in the case. *Id.* at 64, 76 S.Ct. 122. Rather, the government argued, unsuccessfully, that the FTCA contained an implied exception for *all* "uniquely government functions." *Id.* Therefore, *Indian Towing* is generally inapplicable to cases that hinge on the discretionary function exception. *See Varig,* 467 U.S at 812, 104 S.Ct. 2755 (distinguishing the holding in *Indian Towing*).

The Supreme Court addressed the scope of the discretionary function exception in three principal cases. *See Berkovitz v. United States,* 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988); *U.S. v. S.A. Empresa de Viacao Aerea Rio Grandense,* 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984); *Dalehite v. United States,* 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953) (exception covers "[n]ot only agencies of government ... but all employees exercising discretion"). The Court, in *Berkovitz,* created a two- part test to determine the applicability of the exception. First, the government action at issue must involve the element of choice. *Berkovitz,* 486 U.S. at 536, 108 S.Ct. 1954 ("[I]f the

employee's conduct cannot appropriately be the product of choice, then there is no discretion in the conduct for the discretionary function to protect."). Second, the decision must be based on the type of judgment Congress intended to protect; i.e. "the *permissible* exercise of *policy* judgment." *Id.* at 539, 108 S.Ct. 1954 (emphasis added); *United States v. Gaubert,* 499 U.S. 315, 325, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991) (focus of inquiry is not on actor's subjective discretionary intent, "but on the nature of the actions taken and whether they are susceptible to policy analysis"); *Varig Airlines,* 467 U.S. at 814, 104 S.Ct. 2755 (decisions must involve questions of "social, economic and political policy").

First, it is axiomatic that the Coast Guard has complete discretion over all search and rescue procedures. Not only does the very premise of emergency rescue logically suggest that decisions be made quickly and responsively, without the constraints of inflexible procedures, Coast Guard regulations and procedural handbooks specifically mandate as much. The National Search and Rescue Manual states:

> Because of the many variables encountered during SAR operations and the individuality of each SAR case, the guidance provided in this manual must be tempered with sound judgment, having due regard for the individual situation. Nothing in this manual should be construed as relieving SAR personnel of the need for initiative and sound judgment. Therefore, few actions or procedures discussed in this manual are mandatory.

National Search and Rescue Manual, at V. A specific Coast Guard Addendum adds:

> Coast Guard personnel are expected to exercise broad discretion in performing the functions discussed. The Coast Guard retains discretion to deviate from or change this guidance without notice. This document creates no duties, standard of care, or obligations to the public and should not be relied upon as a representation by the Coast Guard as to the manner of proper performance in any particular case.

Coast Guard Addendum, COMDTINST M16130.2B, at 2. The discretionary nature of Coast Guard decision-making is further echoed in its Boat Crew Seamanship Manual:

> The primary purpose of Coast Guard SAR is to save lives at sea. Conducting damage control operations to save property alone should only be done after a complete re-assessment of the situation has been done to ensure the crew will not be subject to undue risk.

Boat Crew Seamanship Manual, at 18-19. Clearly, the exercise of judgment by the Coast Guard on November 2, 1997, was permissible, and therefore satisfies the first prong of the *Berkovitz* test. *See Varig Airlines,* 467 U.S. at 817-19, 104 S.Ct. 2755 (government immune from liability, based on discretionary nature of "spot-check" inspection procedures, as set forth in FAA manuals and handbooks); *compare Berkovitz,* 486 U.S. at 541, 108 S.Ct. 1954 ("Under the regulations, the manufacturer *must* conduct a variety of tests to measure the safety of the product," and "is *required* to submit an application for product license to the DBS")(emphasis added); *Pierre v. United States,* 741 F.Supp. 306, 318 (D.Mass.1990) ("The rules and regulations clearly outline the situations in which lead-based paint *must* be removed.")(emphasis added).

Similarly, the Coast Guard's SAR procedures fulfill the second prong of the *Berkovitz* test. The decision of whether to save the VOYAGER from capsizing, at the expense of putting both the Coast Guardsmen and VOYAGER crew in physical danger, certainly represents "the exercise of policy-based discretion." *Ayer,* 902 F.2d at 1044. Indeed, deposition testimony in this case recounted conversations between Coast Guard officers on the scene, as they weighed the importance of saving human lives against the secondary goal of saving the boat. Policy judgments that concern the safety of individuals must be protected from the "armchair admiralty" of judicial second-guessing. *See id.* at n. 4 (listing cases that have applied the discretionary function exception to policy judgments concerning safety precautions). It is therefore beyond dispute that the implementation of Coast Guard search and rescue procedures is "plainly discretionary activity of the nature and quality protected by § 2680(a)," *Varig Airlines,* 467 U.S. at 797, 104 S.Ct. 2755. Accordingly, defendant United States' motion for summary judgment is allowed.

(2) (2)

No. 03-1486 and 03-1491

In the Supreme Court of the United States

NORTHERN VOYAGER LIMITED PARTNERSHIP;
ONEBEACON AMERICA INSURANCE COMPANY f/k/a
COMMERCIAL UNION INSURANCE COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICI CURIAE* C-PORT, INC. And NATIONAL MARINE CHARTER ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

C-PORT

C-PORT, Inc. ("C-PORT"), is a national nonprofit membership organization. C-PORTS's membership is principally composed of individuals and businesses that provide assistance – including salvage services -- to mariners in the coastal waters of the United States. C-PORT serves as a collective voice for the marine assistance industry, and is the only national organization to do so. In addition to representing the industry in connection with pending legislation, C-PORT conducts an established and ongoing dialog and series of meetings with the senior officials at Coast Guard Headquarters Office of Search and Rescue.

NMCA

The National Marine Charter Association, Inc. ("NMCA") is an incorporated national nonprofit organization that represents the interests of the full spectrum of the marine charter industry.

Founded in 2003 to provide a unified and effective voice for all companies in the marine charter industry, NMCA fully represents and includes as members all types of charter firms, including sailing, fishing, diving, ecotours, water transportation, bareboats, and other excursion vessels. Thus, NMCA membership consists of firms ranging from small family-operated businesses to multi-vessel operations owning a range of both inspected and uninspected vessels.

The Growth of the Marine Assistance Industry

In 1982 Congress directed the United States Coast Guard to review its policies and procedures for towing and salvage of disabled vessels in order to minimize the possibility of Coast Guard competition or interference with private towing activities or other commercial enterprise. PL. 97-322, 96 Stat. 1581§ 113. As a result, the private marine assistance industry has grown into a 35 million dollar per year industry that is responsible for saving many times that amount of property from loss at sea.

The Importance of Salvage to the Environment

Of particular importance to the public is the considerable amount of environmental harm the salvage industry has helped to prevent or minimize worldwide. According to a survey conducted by the International Salvage Union, in 2003 that organization's members carried out 218 salvage operations that recovered more than 605,000 metric tons of potential pollutants, which included 71,833 tons of bunkers (fuel oil); 303,486 tons of crude oil; 61,177 tons of chemicals; and 169,181 tons of other pollutants. This total dwarfs the 37,000 tons of crude oil that was spilled when the EXXON VALDEZ grounded in Alaska in 1989, or the 77,000 tons lost when the PRESTIGE sank off the coast of Spain last year.

The Concern of **Amici**

While C-PORT has worked, and will continue to work, with the U.S. Coast Guard, C-PORT is highly concerned by the First Circuit's reading of 14 U.S.C. § 88. That court gave the Coast Guard the authority to order a mariner to desist from entirely voluntary efforts to save marine property.

C-PORT is concerned that the First Circuit's ruling will have the result of discouraging salvors from coming to the aid of vessels in distress.

Similarly, NMCA is concerned that the decision of the majority of the First Circuit panel threatens the safety of persons and property at sea. The ruling is likely to discourage mariners from requesting assistance from the Coast Guard, or may cause mariners to hesitate too long before calling for Coast Guard assistance, out of concern that the Coast Guard may interfere with salvage and rescue efforts, rather than simply offering assistance.

SUMMARY OF ARGUMENT

The decision of the majority of the First Circuit Panel is directly contrary to the public policy of the United States, as embodied in the opinions of this Court, the lower federal courts, and the treaties and Conventions to which the United States is a party. These affirmatively encourage mariners to take calculated risks to their own lives and property when engaging in efforts to save property from marine peril. This Court should grant certiorari to resolve the conflict between the majority of the First Circuit panel's decision and the previous decisions of this Court, and the other foregoing authorities.

ARGUMENT

THE DECISION OF THE MAJORITY OF THE FIRST CIRCUIT PANEL IS IN DIRECT CONFLICT WITH OPINIONS OF THIS COURT, OTHER COURTS OF APPEALS, AND TREATIES OF THE UNITED STATES GOVERNING THE LAW OF SALVAGE.

A. The Law of Salvage Encourages Risk of Life in Saving Maritime Property.

Salvage is the right of a party, who acts voluntarily to save property and the environment from marine peril and who is successful, either in whole or in part, to recover an award based on the property saved and the party's efforts in preserving the environment. A party performing salvage is entitled to an award, enforceable either *in rem* or *in personam*, up to the value of the saved property. *See, e.g.*, *The SABINE,* 101 U.S. (11 Otto.) 384 (1879).

> Compensation as salvage is not viewed by the admiralty courts merely as pay on the principle of *quantum meruit* or as a remuneration *pro opere et labore*, but as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property.

The BLACKWALL, 77 U.S. (10 Wall) 1, 14; 19 L.Ed. 870 (1869). As one court recently explained, "In order to provide sufficient incentive for seamen to undertake the risks of salvage, awards are not limited to a strict *quantum meruit*; instead, they are more in the nature of a bounty." *Allseas Maritime, S.A. v. M/V Mimosa*, 812 F.2d 243, 246 (5th Cir.

1987). This "bounty" element is a critical aspect of salvage law.

This Court has made it clear that the risk involved in effecting salvage is one of the factors that a court should consider in issuing a salvage award. As was described in *The Blackwall* the factors to be considered in making an award are:

> (1.) The labor expended by the salvors in rendering the salvage service. (2.) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3.) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. (4.) The risk incurred by the salvors in securing the property from the impending peril. (5.) The value of the property saved. (6.) The degree of danger from which the property was rescued.

The BLACKWALL, id. at 14. These factors were essentially repeated in the Brussels Salvage Convention of 1910, to which the United States is a Party. *See*, Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, Sept. 23, 1910, art. 8, 37 Stat. 1658, 1671, 212 Consol. T.S. 187, 191. The factors were most recently updated to include recognition of efforts to prevent or minimize environmental damage in the London Salvage Convention of 1989. The United States became a party to the Convention in 1996. International Convention on Salvage, Apr. 28, 1989, S. Treaty Doc. No. 102-12 (entered into force July 14, 1996) ("SALCON 89").

Thus, the greater the risk to property and to salvors, the greater the reward, and the greater the incentive to a salvor to undertake a salvage operation. The award of salvage *encourages* mariners to risk their lives to save marine property. *See Dize v. The Steel Barge BEVERLY*, 247 F. Supp. 968 (E.D. Va. 1965) (stating that salvage "is given for services rendered at the risk of life"), *citing, The BLACKWALL, id.*

One relatively recent example involves salvage of a barge carrying an external fuel tank for the space shuttle – salvage of which the United States was a beneficiary. The Court of Appeals for the Fifth Circuit took into account that the salvors "incurred extremely high risk in securing [the barge and its cargo], both as to loss of their ship and lives and as to the creation of substantial environmental liability in the event of an oil spill." *Margate Shipping Co. v. The M/V JA ORGERON*, 143 F.3d 976, 985 (5th Cir. 1996).

Given the great hazards of any rescue operation at sea, if salvage law were not to take into account the risk of life in the amount of an award, much valuable property would be lost to the sea, for its rescue would be far less worth the risk to any rational party. *R.M.S. Titanic, Inc. v. Haver,* 171 F.3d 943, 962 (4th Cir. 1999); *The M/V JA ORGERON*, 143 F.3d at 986 n.2; *see also* William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. Leg. Stud. 83, 100 (1978) (arguing that the law of salvage exists to "encourage rescues in settings of high transaction costs by simulating the conditions and outcomes of a competitive market").

The decision of the majority of the First Circuit panel merits review by this Court because it seriously threatens the

"bounty" aspect of a salvage award – a legal principle that has literally taken millennia to evolve into its present form.

B. By Allowing the Coast Guard to Prevent Mariners From Rescuing Property Whenever the Coast Guard Considers that the Risk to Life is Great, the Decision of the Majority of the First Circuit Panel Discourages Parties from Undertaking Risky Salvage Operations and Seriously Reduces Incentives for Parties to Undertake Environmental Salvage.

The majority of the First Circuit Panel has read unprecedented powers into the text of 14 U.S.C. § 88(a)(1) that allows the Coast Guard to "perform any and all acts necessary to rescue and aid persons." The First Circuit interpreted this phrase to permit the Coast Guard to stop the Master of the NORTHERN VOYAGER in his efforts to save his own vessel. These efforts would have allowed a professional salvor (or even the crew alone) to prevent the loss of the vessel. Essentially, the majority allowed the Coast Guard to curtail private salvage operations anytime the Coast Guard in its sole discretion decides the operation is too dangerous for its liking.

To be sure, the panel majority attempted to limit this rule by requiring "an objectively reasonable belief by safety officers that a true emergency exists and there is an immediate need for assistance or aid." *Thames Shipyard and Repair Co. v. U.S.*, 350 F.3d 247, 259 (1st Cir. 2004). However, as the dissent noted, that limitation makes no sense, for, once an agency's actions come within the scope of the discretionary function exception, a court has *no jurisdiction* to further consider reasonableness of the exercise of that jurisdiction.

Id. at 270 (Torruella, J., dissenting), *citing Berkovitz v. U.S.*, 486 U.S. 531, 539 (1988).

Most importantly, it must be recognized that in *every* salvage situation, as a matter of the law of salvage, there *must* exist a real, or reasonably perceived, *marine peril*. *See, e.g., The SABINE* 101 U.S. (11 Otto.) at 384; *see generally Faneuil Advisors, Inc. v. O/S SEA HAWK*, 50 F.3d 88 (1st Cir. 1995) (denying an award of salvage where there was apprehension of, but not an actual, peril). Accordingly, the rule articulated by the majority of the First Circuit panel would allow the Coast Guard to call off virtually *any* operation that could hope to qualify for a salvage award – almost by definition.

If the decision of the majority of the First Circuit panel is the law, then in the future, a potential salvor will have to consider not only its own risk and potential reward (as has been the tradition of sea for centuries), but will have to also consider a new and discouraging calculus. In deciding whether to mount a salvage effort, the salvor will also have to consider the genuine risk that the Coast Guard may intervene, as was done in the case before the First Circuit, and thereby destroy the salvor's investment in the operation.

The case before the First Circuit provides a concrete example. The salvor, Mike Goodridge, had actually mobilized people, pumps, dive gear and a boat, and had almost reached the NORTHERN VOYAGER. The interference of the Coast Guard prevented him from saving the ship, and the award he could have earned was lost forever as the NORTHERN VOYAGER sank. But more than this, even if he had reached the NORTHEN VOYAGER and had invested hundreds of hours in saving it, the rule in the First Circuit would nevertheless allow the Coast Guard to force *him*

off – just as it did Captain Haggerty – sending his investment to the bottom with the ship. It is difficult to imagine a greater discouragement to the zeal and incentives that the marine industry (and court decisions) have attempted to nuture and cultivate in salvors over the centuries.

Similarly, if the decision of majority of the First Circuit panel is law, then a mariner in peril will be less likely to issue a distress call to the Coast Guard, or to anyone else who may overhear it, for fear that the Coast Guard will respond to the scene and interfere with the private salvage efforts that might stand a chance of saving the vessel. Indeed, for similar reasons, NMCA has been advised by several of its members in Alaska, that they have contracted with private firms to provide helicopter evacuation of crew members in emergencies, rather than risk interference by the Coast Guard in the management of their vessels.

Turning to environmental salvage, the First Circuit's rule would be especially harmful. In the first place, by allowing the Coast Guard, *without any accountability*, to order the abandonment of a vessel, the majority of the First Circuit panel encourages needless environmental damage and multiplies the expense of clean up and restoration. The expense of preventing or controlling a spill from a sunken vessel is almost always greater than the expense of controlling a spill when the vessel remains afloat. Indeed, in the case before the First Circuit, the owners of the NORTHERN VOYAGER, were required to spend some $350,000 to have the fuel oil pumped out of the tanks of their sunken vessel as she lay on the bottom.

If a fully laden commercial tanker had been involved rather than a fishing vessel, the results could have been catastrophic. In the recent sinking of the PRESTIGE off the

coast of Spain, the cost of clean-up is estimated to have been more than $700,000,000. Professionals estimate that had proper measures been taken before the vessel sank (prohibited in the case of the PRESTIGE) clean-up costs could have been capped at some $50,000,000.

Finally, in situations in which a vessel is spilling pollutants into the ocean, the rule adopted by the majority of the First Circuit panel would discourage salvors from mobilizing to prevent environmental harm. Potential salvors could not be sure whether the Coast Guard would force the abandonment of the polluting vessel, preventing the salvors from receiving an award. Without the availability of an award for saving the vessel, the incentives to carry out salvage are seriously reduced.

Section 14 of SALCON 89, S. Treaty Doc. No. 102-12 (entered into force July 14, 1996) , does provide for *some award* even if the polluting vessel is a loss. But that award may be capped at the salvor's "standard rates" (*e.g.*, for contract work), *see International Towing and Salvage, Inc. v. The F/V LINDSEY JEANETTE,* 1999 A.M.C. 2465 (S.D. Fla. 1998), or even at its bare out-of-pocket costs. *See Semco Salvage and Marine Pte. Ltd. v. Lancer Navigation Co. Ltd.,* [1997] A.C. 455, 1997 A.M.C. 1989 (House of Lords). This is far less than a classic salvage award in the nature of a "bounty." *See The M/V MIMOSA*, 812 F.2d at 246. Thus, the threat of Coast Guard interference leading to loss of the vessel (as here) presents a genuine discouragement by making any response effort less appealing in the eyes of a salvor.

If a salvor cannot save the vessel from loss, even the more modest (non-"bounty") compensation described above may be unavailable. This is because of the Limitation of Liability Act of 1851, 46 U.S.C. 183-188. This Act sets an aggregate cap

on recovery equal to the post-incident value of the ship, plus any freight revenue earned on the voyage. If the vessel is lost, this aggregate cap is likely to be quite modest. And a salvor must typically *share* it with other claimants, in a procedure similar to creditors sharing in the estate of a bankrupt debtor. *See Allseas Maritime, S.A. v. M/V Mimosa,* 812 F.2d 243 (5th Cir. 1987) (refusing to consider potential environmental damage in light of the Limitation of Liability Act of 1851).

As the above points illustrate, the prospect of Coast Guard interference is a grave threat to the economic incentive that is the life's blood of the salvage industry.

CONCLUSION

For the forgoing reasons, this Honorable Court should grant the Petitions for Certiorari in Nos. 03-1486 and 03-1491, so that the Court may review the judgment of the First Circuit Court of Appeals.

Respectfully submitted,

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